Supreme Court, U.S.
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# In The
# Supreme Court of The United States

◆

**James Franklin Love,**
*Petitioner,*

v.

**Harold Carter, Warden,**
*Respondent.*

◆

**Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit**

◆

## PETITION FOR WRIT OF CERTIORARI
**with Appendix**

◆

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**January, 2001**

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193 pp

# QUESTIONS PRESENTED FOR REVIEW

## QUESTION ONE

IS PROOF OF ACTUAL INNOCENCE RELEVANT AND ADMISSIBLE TO SHOW THE CONSTITUTIONAL ERRORS RAISED IN A PETITION FOR WRIT CAUSED "ACTUAL PREJUDICE" AND HAD A "SUBSTANTIAL AND INJURIOUS EFFECT ON A JURY'S VERDICT?"

## QUESTION TWO

DOES THE STANDARD SET FORTH IN *SLACK V. MCDANIEL*, GOVERN REQUESTS FOR CERTIFICATES OF APPEALABILITY SOUGHT TO REVIEW PRELIMINARY PROCEDURAL ISSUES DECIDED ADVERSELY TO A PETITIONER DURING HABEAS PROCEEDINGS IN THE DISTRICT COURT?

## QUESTION THREE

DOES 28 U.S.C. §2253 (C) UNCONSTITUTIONALLY PREVENT REVIEW OF CUMULATIVE ERROR BY HOLDING THE INDIVIDUAL CONSTITUTIONAL ERRORS TO TOO HIGH OF A THESHOLD SHOWING FOR CERTIFICATE OF APPEALABILITY TO BE GRANTED?

# LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioner, James Franklin Love, was the Defendant in the Ohio State Court of Common Pleas and Appellant in the Ohio Appellate Courts, the habeas Petitioner in the United States District Court for the Southern District of Ohio and the Appellant in the Sixth Circuit Court of Appeals.

Respondent, who was the Respondent/Defendant in the United States District Court for the Southern District of Ohio and the Appellee in the Sixth Circuit Court of Appeals, is Warden, Harold Carter.

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## JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1) and the holdings in *Hohn v. United States*, 524 U.S. 236 (1998) and *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999).

The decision of the Sixth Circuit Court of Appeals denying Certificate of Appealability on additional issues and denying Love's Motion to Expand the Record were issued November 1, 2000. (Order, Apx. B-1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2253 (c)(1) Appeal:

**(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

**(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

**(B)** the final order in a proceeding under section 2255.

**(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

**(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

**(4)** Rules of Appellate Procedure 10(e)(2) (Apx. O-1)

**(5)** Rule 7 Governing §2254 cases (Apx. P-1)

## STATEMENT OF THE CASE

### 1. Basis for federal jurisdiction in the court of first instance.

The United States District Court for the Southern District of Ohio was vested with jurisdiction over this matter pursuant to 28 U.S.C. §2254 because Petitioner was a state prisoner alleging his unconstitutional detention.

### 2. Facts of Case.

In state court in Ohio, Love stood trial in 1987 on charges of Gross Sexual Imposition and Attempted Rape alleged to have occurred on September 7, 1986. Also a charge of Statutory Rape which contained a sentencing enhancement alleging Love "purposefully compelled by force or threat of force" the victim on August 26, 1986.

Love was specifically acquitted of the Gross Sexual Imposition and Attempted Rape as well as the special sentencing enhancement accompanying the Statutory Rape charge. He was convicted of Statutory Rape. This conviction was vacated after post-conviction proceedings. The trial court found the introduction by the prosecution of a 1982 conviction "rendered fundamentally unfair" the 1987 trial. A new trial was ordered.

While awaiting retrial, and after filing notice to introduce evidence the 1987 "virginal" victim was pregnant by a 22 year old at the time of the first trial, new charges were then filed against Love.

In 1996, five counts of Rape were filed. A new trial judge was assigned upon motion by the State. Both cases, the retrial of the 1986 case and the 1996 new indictment, were consolidated for trial over objections. A Motion for Severance and Motion for Relief from Prejudicial Joinder were also denied.

The new trial court held simply it was not "bound" by the prior court's holding, the 1987 trial was unfair, and allowed the State to introduce the prior conviction at the 1996 trial. Further, as opposed to merely mentioning the prior conviction at the first trial, the new trial court allowed detailed and explicit testimony as to the conviction into evidence. This was done over the defense Motion to Suppress and complaints of intentional prosecutorial and judicial misconduct.

The prosecution was allowed to introduce testimony regarding the Gross Sexual Imposition, Attempted Rape and the sentencing enhancement of which Love had specifically been acquitted in 1987. This evidence was admitted, over objections, and was allowed into evidence of the consolidated case of the 1986 retrial and the 1996 indictment.

The 1996 indictment was alleged to have occurred, "sometime in 1988, sometime in 1989, and sometime in 1990." Upon filing a Notice of Alibi, the State refused to give dates of the crimes charged. It was only during trial the defense was informed as to the times and dates of the charges. Given the lack of notice, all evidence the defense could find to prove Love was in Mexico during the times testified to was produced. The evidence consisted of a U.S. Passport, and telephone records of Love's mother. These records reflect collect calls from Zihuatanejo, Mexico and Belize City, Belize commencing December 1, 1988 and continuing until July 20, 1989.

Evidence was introduced Love had dated both alleged victims' mothers, both the alleged victims and their mothers had been to Love's mother's home, 151 collect telephone calls accepted by the alleged victim's mother from Love, and letters exchanged between the mother, daughter and Love over a two year period. The courts held Love's "identity" was placed in issue by the combined defense of a complete denial and the alibi defense. In retrial, the courts held "identity" was in place in issue by Love's total denial the crime had occurred, and by evidence of the second pregnancy at the retrial. "Identity" was not in issue at the first trial.

In the 1996 indictment, five lesser included offenses of Sexual Battery were also charged in conjunction with the five counts of statutory rape. A Rule 29 acquittal was granted on these offenses with a specific acquittal entered based on a finding of "insufficient evidence" to prove Love was "acting *in loco parentis*" over the alleged victim at any time during the alleged commission of the offenses.

The trial court gave an instruction to the jury on the five greater offenses of rape, over objection, which required the jury to find that Love was acting "*in loco parentis*" over the alleged victim on the greater offense of rape, in the "force" life sentencing enhancement. This instruction lessened the State's burden of proof from a required finding Love "purposely compelled" her by "force or threat of force," to a required finding Love had a "relationship" with her meeting the requirements of being "*in loco parentis*."

The 1996 indictment containing the charge of rape was testified to at trial by the alleged victim as occurring, "the week after Christmas in 1988." (N-2) The two 1989 charges of rape were testified as having occurred, "each month after [the first time]." (N-1) Another 1989 charge of rape was dismissed for lack of jurisdiction. It was testified as occurring, "in the springtime [of 1989]." (N-2). The total evidence in the record of the 1990 charge of rape was her testimony, "I can't remember when the last time was." (N-2). No evidence of guilt of this 1990 charge appears in the record.

Trial in this matter was in June, 1996. The jury returned a verdict of guilty on the statutory rape charge alleging August 26, 1986. It also returned verdicts of guilty on the four remaining charges in the indictment.

Due to the one year time limit imposed by 28 U.S.C. §2244 (d)(1), Love was compelled to file a Petition for Writ of Habeas Corpus in October, 1998.

Since the convictions occurred, Love has diligently searched for evidence to establish his innocence. Notice of the dates was not made until trial began.

Witness affidavits, medical records and written documents were discovered over the time the habeas petition and appeal of its dismissal were pending.

The first witness found actually with Love in Mexico, Carienne Thompson-Jordan, of Canada (I 6-8; K 7-12) was not located until summer, 1998. Thompson attests that she met Love in Mexico in the "fall" of 1988 and saw Love once every two or three days until May 1989.

The second witness found who was in Mexico with Love, (L 4-9), was Yvonne Zeltner-Muller of Switzerland. She supplied an affidavit and documents. Zeltner attests that she met Love in January 1989 in Mexico and he was there during her stay from January 2, 1989 until February 28, 1989. She included photographs of Love with her in Mexico.

The third witness found was Angela Erwin-Peal of West Virginia. Erwin had contacted Love while he was in Mexico and received both collect phone calls and letters from him in Mexico December through March of 1988-89. (C 3-5; J 5-6).

The fourth witness found was Dr. Pamela Hanson. Medical records and an affidavit were obtained and filed. (C 6-17) Those medical records of November 11, 1988 show Love seeking immunizations to "travel to old Mexico," and stating Love was "leaving Sunday." Those records also reflect in August 1989 Love sought treatment for scabies contracted in Mexico and he had "just returned from Mexico." The last treatment for scabies was given on 10/14/89. Neither the alleged victim in the 1996 indictment, nor the alleged victim's mother testified she had scabies, or contracted scabies from the alleged sexual conduct or contact.

The fifth witness found who was in Mexico with Love was Lynn Freed. (C 18-21). Freed is the author of the book Home Ground. Freed is a citizen of South Africa and was found in July 2000 living in California. (C-18) Freed was in Mexico from December 5, 1988 until December 8, 1988 and states she autographed the book submitted by Love between those dates in Mexico.

Motions to Expand the Record with the above documentary evidence and affidavits were denied by both the U.S. District Court and the Sixth Circuit. Motions for an evidentiary hearing were also denied. Appealability on these issues was denied.

Love filed Motion to Stay Proceedings and Notice on Intent to Appeal to this Court pursuant to *Hohn v. United States*. A Stay of Proceedings was issued pending a determination whether Love was entitled to appeal under *Hohn*. (A-1). The time for filing for Certiorari expiring January 29, 2001, this action ensued.

Numerous collect calls from Mexico and across the U.S. are not reflected in the trial record. The actual records are not fully depicted on the trial record and the transcripts do not show Love's collect calls to his mother's home beginning in Belize in June 1989 and demonstrate a travel path returning to Cincinnati, after July 20, 1989. Transcripts show the issue date of Love's passport as being May 30, 1989. However, the record *does not* reflect the *place* of issuance of the passport was the U.S. Embassy in Mexico on May 30, 1989. Love moved to expand the record of the Petition for Writ with the telephone records and passport under Habeas Rule 7 in order for this evidence to be seen by the District Court by an examination of those trial exhibits. (M-1) That motion was denied.

Objections were filed. The District Court denied the objections by ignoring the procedural defaults raised by the State. This evidence was further claimed by Love as necessary for comparison to the photos submitted in Zeltner-Muller's affidavit, dated as developed in April 1989, which show Love and Zeltner together in Mexico. An examination of the passport photo would show it was Love in the photos submitted by Zeltner.

The District Court and Court of Appeals denied Love's Motions to Expand the Record filed pursuant to Rules Governing §2254 cases, Rule 7. The evidence was filed in response to numerous asserted procedural defaults that were raised by Ohio in the Return of Writ. Love asserted the newly discovered evidence "buttressed" his alibi evidence. The newly discovered evidence of actual innocence was relevant in the Court's determination of whether the admission of the "other acts," caused Love "actual prejudice," and had a "substantial and injurious effect or influence on the jury's verdict."

## REASONS FOR GRANTING OF THE WRIT

## QUESTION ONE

The question lies squarely between this Court's ruling announced in *Murray v. Carrier*, 477 U.S. 478, 496 (1986) that evidence of actual innocence can be relevant to overcome a state procedural default and the holding of this Court in *Herrera v. Collins*, 506 U.S. 390, 400, 404 (1993) that an independent and freestanding claim of actual innocence must fall on Petition for Writ of Habeas Corpus.

As noted in *Schlup v. Delo*, 513 U.S. 298, at 321 (1995), few habeas petitioners have ever satisfied any definition of actual innocence. The plethora of evidence submitted on Motion to Expand the Record in this case, and denied admission into the record in the lower courts, meets or exceeds the stringent standards set forth in *Herrera,* supra, for a showing that a manifest miscarriage of justice has occurred in this case.

Overwhelming newly discovered evidence not presented to the State courts because the mandates of 28 U.S.C. §2244 (d)(1) required a Petition for Writ be filed before that evidence could be discovered, is admissible upon a Motion to Expand the Record under Rules Governing §2254 cases, Rule 7, and F.R.App.P. 10(e)(3), to prove actual prejudice to a petitioner.

As in *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997), *cert. denied* 523 U.S. 1133 (1998), Love asserted from the beginning he did not commit any crime. He cannot prove himself actually innocent of all crimes. The 1986 case simply turns on credibility and Love was at least living in Cincinnati at the time the crimes were alleged to have occurred. But as noted in *Schlup*, at 328, n.47, "Actual innocence, of course, does not require innocence in the broad sense of having led an entirely blameless life." *Id.* Like the defendant in *Schlup*, it is the sordid details of an earlier offense, wrongfully admitted into evidence, the prejudicial consolidation of offenses, and the introduction of detailed testimony as to three previously acquitted offenses which has caused the conviction for crimes of which Love is actually innocent, and of which he can prove his actual innocence.

It is axiomatic under a system where the rule of law prevails that citizens should only be incarcerated for crimes for which they are guilty. Where, after conviction, overwhelming newly discovered proof a jailed citizen is innocent is discovered, that evidence should be admissible to prove actual prejudice from claimed constitutional violations occurring at the trial, just as this Court has held overwhelming proof of guilt appearing on the record is relevant in determining that a constitutional error was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993).

Love did not withhold this evidence. The State created this situation by refusing to give dates as to when the 1996 charges were to have occurred when it knew full well the dates from pretrial interviews of witnesses.

The late discovery of this evidence was not due to a lack of diligence. That witnesses are from three separate continents should weigh heavily in a determination of when the evidence was "available" and the diligence required to locate the witnesses. Efforts continue to obtain additional evidence to be admitted at an evidentiary hearing. What do the principles of equity require if proof of guilt is relevant to render a constitutional error harmless? Does not "fair and just" also require overwhelming proof of actual innocence, as proof the errors were not harmless, be allowed into evidence, where that evidence was not withheld and the State caused the delay in discovering the evidence by withholding relevant dates.

This Court should hold newly discovered proof of actual innocence is always relevant to the determination of whether the criminal defendant was prejudiced by the errors advanced on Petition for Writ of Habeas Corpus, even if a freestanding claim of innocence would not entitle the defendant to relief.

In *Schulp*, this Court holds both proof of innocence to the constitutional claim raised, and disassociated proof of innocence from the constitutional claim. See, Federal Habeas Corpus Practice and Procedure, 3rd Edition, 1998, by Liebman & Hertz, published by Lexis Law Publishing, §26.4, p. 1122, n.14. (*Schlup* decision "delinked" evidence of actual innocence from the constitutional violation.) See, *Schlup*, supra, at 316-17; 326-328 (holding the reviewing court should consider evidence "unavailable" at trial.) Only at page 324 of the *Schlup* decision does this Court "link" proof of actual innocence with the constitutional violation. *Id.*

This Court held in *Schlup* that "illegally admitted" evidence must be evaluated "with due regard to any reliability of it." *Id* at 328. To establish the requisite probability, a petitioner must show it is more likely no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.

In light of the newly discovered evidence, proving conclusively Love was in Mexico and Belize during the same time the alleged victim testified he was in Cincinnati (committing three of the four crimes resulting in consecutive life sentences) no reasonable juror would have convicted Love.

Love was granted Certificate of Appealability (hereinafter "COA") on whether the admission of "other acts" evidence, and previously acquitted acts, rendered his trial fundamentally unfair and violated Double Jeopardy. The evidence complained of was used solely as propensity evidence and no legislative intent in Ohio, or rules of evidence such as now exists in the federal system, allowed admission of that evidence. Compare, *U.S. v. LeCompte*, 99 F.3d 274 (8th Cir. 1996) and *U.S. v. Sumner*, 119 F.3d 658 (8th Cir. 1997) with *U.S. v. LeCompte*, 131 F.3d 767 (8th Cir. 1997) and *U.S. v. Sumner*, 204 F.3d 1182 (8th Cir. 1999). The admissibility of this evidence turns on legislative intent. Ohio law is in opposite. O.R.C. §§2907.02 (D), 2945.59. Both issues granted in the Certificate of Appealability require a determination of actual prejudice. Proof Love is actually innocent, and the jury convicted him after having been severely prejudiced, despite strong evidence of alibi, and testimony by the alleged victim's mother she had not met him until *after* he returned from Belize, show the constitutional errors reviewed, "had a substantial and injurious effect or influence on the jury's verdict." Proof of actual innocence is relevant to the determination of whether the errors raised were in fact "harmful." Petition for Certiorari should issue on this question.

## QUESTION TWO

This Court resolved the standard of review required for procedural dismissals in *Slack v. McDaniel*, 120 S.Ct.1595 (2000) holding a Petitioner must show jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

This Court has not resolved whether preliminary procedural rulings, such as the denial of a motion for evidentiary hearing and Habeas Rule 7 motions to expand the record with proof of a manifest miscarriage of justice as a procedural defense, in this case, are governed by the same relaxed standard. The Eighth Circuit Court of Appeals, *en banc*, held no Certificate of Appealability was required to all to appeal preliminary procedural issues. See, *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999).

The State raised numerous procedural defaults in the Return of Writ. Love claimed actual innocence and a manifest miscarriage of justice and moved to expand the record with newly discovered evidence Love was living 4,000 miles from Cincinnati at the times testified at trial. He moved for an evidentiary hearing on the newly life sentences) no reasonable juror would have convicted Love.

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The State raised numerous procedural defaults in the Return of Writ. Love claimed actual innocence and a manifest miscarriage of justice and moved to expand the record with newly discovered evidence Love was living 4,000 miles from Cincinnati at the times testified at trial. He moved for an evidentiary hearing on the newly discovered evidence of actual innocence, and on the mutually exclusive and logically inconsistent findings of facts made by the State court. The District Court, in its Opinion held Love had invoked his right to self-representation on appeal "too late." (G-57-60) The problem with this holding is the right to self-representation was not the only question presented.

Love raised he had a due process and equal protection right to file *pro se* supplemental briefs where counsel refused to raise intentional misconduct on direct appeal. Love distinguished between the right to self-representation, and the right to file a *pro se* supplemental brief on appeal. A supplemental brief to raise issues counsel, although instructed to raise, refused to raise. The District Court, finding Love's *pro se* briefs as procedurally defaulted, was then required to grant the Habeas Rule 7 motions to expand the record and conduct an evidentiary hearing. While this Court recently held there is no right to self-representation on direct appeal, this Court has never addressed the separate right to file a supplemental *pro se* brief on issues that were objected to at trial but appellate counsel refuses to raise because those errors of intentional misconduct attack a trial judge. The right to file and preserve issues for further review which were not raised by counsel on appeal is a distinct and separate right from the right to total self-representation on appeal. Otherwise a criminal appellant becomes merely a passenger to counsel's local political interests and important issues are defaulted for further review. COA was denied on this issue.

Further, the trial record is clear Love's counsel did not specifically object to all of Love's claims the combined jury instructions both caused the "other acts" evidence to be used to prove the statutory rapes "occurred," and caused the jury to use the acquitted "other acts" as proof of issues requiring proof beyond a reasonable doubt in violation of *Dowling v. United States*, 493 U.S. 342, 349 (1990). The failure to comply with the contemporaneous objection rule is a procedural default. *McBee v. Grant*, 763 F.2d 811, 813 (6th Cir. 1985). The State raised this procedural default in the Return of Writ. Love called this to the District Court's attention in objections to the denial of motions to expand the record. The District Court ignored the procedural defaults and proceeded to rule on the merits, and deny the objections. (G 44-54).

It avoided the equitable considerations raised by proof of actual innocence, and claims it is relevant in the determination of actual prejudice, by ignoring clearly asserted State procedural defaults and proceeding to a ruling denying the merits based on the adoption of mutually exclusive and logically inconsistent State court findings of fact.

COA was erroneously denied on these issues. Petition for Certiorari should issue on this question.

## QUESTION THREE

In the 1996 indictment, Love raised a defense of alibi coupled with a complete denial. A defense was raised in the 1986 indictment on retrial of a complete denial of the crime. No physical evidence supported a crime had occurred.

The intentional denial of a fair trial and due process of law caused by intentional misconduct was raised. The prosecution and the trial judge ignored evidentiary laws and protections afforded Love by O.R.C. §2907.02(D) and O.R.C. §2945.59. Inadmissible and extremely prejudicial evidence was placed before the jury to ensure verdicts of guilty. Love was denied a fundamentally fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments when all pretrial suppression, prejudicial consolidation of offenses and Motions in Limine were decided from the presumption the crimes had occurred. This was the ultimate issue to be decided by the jury before reaching the question of the life sentencing enhancements in the 1996 indictment. COA was denied on this issue.

If evidentiary rulings, pursuant to Ohio Evidence law are made from a presumption of guilt, all appears mildly permissible. But if the same evidentiary rulings are made from a presumption of innocence on the ultimate issue, then the pattern of misconduct becomes apparent in this case. COA was denied on this issue.

It is in the context of the structure of the trial, over and above the individual evidentiary and double jeopardy errors, where the real injustice lies in this case. Love was "indicted for his whole life." This would seem permissible to some who approach trials from a layman's standpoint and ignore the protections of evidentiary law developed over the past 700 years since the Magna Carta. But from the standpoint a jury should not be impermissibly prejudiced by immaterial and prejudicial evidence, this trial was simply fundamentally unfair. It shows the dangers of allowing the nature of the crime to influence how the trial is conducted. Couple this with the newly discovered evidence of actual innocence and the harm becomes even greater. False accusations of child rape are used to ensure convictions on all charges placed before the jury. The spill over of evidence between the two indictments caused actual prejudice by allowing the false charges to bolster the charge in the 1986 indictment on retrial. Or, as argued by the prosecution, "proof of his guilt," and, "corroboration." COA was denied on prejudicial joinder of offenses, prosecutorial misconduct, and the jury instructions which aggravated the prosecution's impermissible use of that evidence.

A fair judgment on the issues granted COA cannot be reached without a detailed review and consideration of the other issues denied COA. Each of which, become an independent constitutional violation if the Writ should be granted on the issues granted COA, and all of which support claims the misconduct was intentional.

Where the type of relief to be granted to a habeas petitioner could be affected by issues inextricably related to grounds upon which COA has been granted, it would seem to follow COA should be granted as to those errors as well.

The denial to appeal additional errors has the affect of preventing a review of cumulative error, or the type of a pattern of egregious misconduct warranting habeas relief discussed in *Brecht v. Abrahamson*, supra, at Note 9.

Love is entitled to habeas relief for not only the individual errors raised in the Petition for Writ of Habeas Corpus, but for cumulative error, should the individual errors fail to meet the *Brecht*, standard.

To deny COA on prejudicial joinder, prosecutorial misconduct, and erroneous jury instructions, in this case, is to prejudge the issues granted COA. The Court would have to find error of constitutional magnitude in the jury instructions, prosecutor's use of the evidence, and a spill over of evidence as creating actual prejudice **before** it could grant relief on the Certificate of Appealability that was granted.

28 U.S.C. §2253(c) induces an effect of tunnel vision on the Court. It permits the court to examine the individual tree for disease, when the Court's duty is to determine if the entire forest is blighted It infringes upon the court's duty to correct manifest miscarriages of justice, police local prejudices and trial obtained by the "clamor of an excited people," as opposed to the relevant and admissible evidence as to the crimes charged. (citation omitted).

Love's trial was fundamentally unfair and 28 U.S.C. §2253 (c) prevents it being exposed by focusing the Court's attention only on individual aspects of the trial.

The entire purpose of §2253 is to prevent "groundless" or "frivolous" appeals in Habeas cases. See, 42 Cong. Rec. 608 (1908)(Statement of Re. Littlefield);

Accord, H.R. Rep. No. 23, 60th Cong., 1st Sess. pt.1 (1908). This standard was adopted by this Court in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). In *Hohn v. United States*, supra, this Court overruled *House v. Mayo*, 324 U.S. 42 (1945)(per curium). *House*, held that a denial of a request for a Certificate of Probable Cause was not a final appealable order. *Id.* In overruling *House*, this Court reasoned that the denial of appeal cannot be reconciled with this Court's practice in other cases.

The same reasoning should be applied when reviewing the requirement of obtaining individual Certificates of Appealability by habeas appellants. Such a requirement of obtaining permission to appeal individual issues clearly preserved for review is unprecedented. The granting of a Certificate of Probable Cause went to all issues in the case and could not restricted to any one or two claimed errors. See, e.g., *Chacon v. Wood*, 36 F.3d 1459, 1466-67 (9th Cir. 1994).

The appellant could set forth any and all errors which he could claim individually or cumulatively resulted in a violation of due process. This is particularly important to the appellant in claimed errors involving prosecutorial or judicial misconduct, or general due process claims. See, e.g., *Walker v. Engle*, 703 F.2d 959 (6th Cir.), *cert. denied*, 464

U.S. 951 & 962 (1983). This included constitutional errors that in and of themselves may be harmless, but which either aggravated another constitutional claim by heightening the prejudice, or cumulatively with the other errors claimed, raised "grave doubt" as to the overall fairness of the trial as a whole. 28 U.S.C. §2253(c), as enforced in this case, undermines general due process claims of a violation of fundamental fairness by stripping the specific constitutional errors from the consideration of the reviewing court.

The simple fact that other Circuit Courts of Appeals have disagreed on the right to file a *pro se* brief on direct appeal has been found to be sufficient reason to issue a Certificate of Probable Cause in other circuits. See, e.g., *Lynce v. Mathis*, 519 U.S. 433, 436 (1997). Yet, Certificate of Appealability was denied as to this issue. Love's right to file a *pro se* brief on direct appeal under the due process and equal protection clauses, and the First Amendment, are distinguishable from *Martinez v. California Court of Appeals*, 120 S.Ct. 684 (2000). *Martinez* was decided based on the right to self-representation. It was only because of the nature of the judicial and prosecutorial misconduct claims raised in those *pro se* briefs that leave to file was denied. It was demonstrated to be common practice in meaningful determination be made short of a full merit review in cases such as Love's case?

Obviously Love's additional issues could be resolved differently by the reviewing court and are not squarely foreclosed by any authoritative court decisions. *Barefoot v. Estelle*, supra, at 893 n.4; 894. These constitutional claims are an intricate part of the issues granted Certificate of Appealability by the District Court. They are also part of any cumulative error analysis.

They would, if prevailed upon, be an intricate part of any decision as to what relief was to be granted if, upon review, any reasonable jurist would have to conclude this experienced prosecutor, and a sitting judge, deliberately, intentionally, structured the trial in a manner designed to so prejudice the jury with immaterial "other acts" evidence as to cause the jury to convict. This would have collateral consequences under the double jeopardy clause when, upon the grant of the Writ, the State attempted to proceed to retrial. These interests in preventing a retrial after the first was vacated for intentional misconduct, are sufficient to warrant the granting of COA on those issues. The denial of COA on these issues now deprives Love of a full and fair review of the total circumstances of the trial. Certiorari should issue on this question.

## CONCLUSION

Petitioner hereby respectfully requests that this Court exercise its discretionary jurisdiction and grant the petition for writ of certiorari as to the questions presented herein.

Respectfully submitted,

HAL ROGER ARENSTEIN
Ohio Bar No. 0009999
Arenstein & Gallagher
Attorney for Petitioner
The Citadel
114 East Eighth Street
Cincinnati, Ohio 45202
(513) 651-5666

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◆

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◆

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**
**100 EAST FIFTH STREET, ROOM 532**
**POTTER STEWART U.S. COURTHOUSE**
**CINCINNATI, OHIO 45202**

| | |
|---|---|
| **Leonard Green**<br>**Clerk** | **Ms. Michelle M. Davis**<br>**(513) 564-7025** |

**Filed: November 27, 2000**

Mr. William R. Gallagher
114 E. Eighth Street
Cincinnati, Ohio 45202

Mr. M. Scott Criss
Office of the Attorney General
Corrections Litigation Section
140 E. Town Street
14th Floor
Columbus, OH 54215-6001

RE: 00-3313
Love v. Carter
District Court No. 98-00777

Dear Counsel:

Please be advised that the above-styled case will be held in abeyance pending the disposition of one of the items listed below:

Motion of appellant to stay appeal.

Upon resolution of the above mentioned matter, we will instruct you further.

Leonard Green, Clerk

/s/(Ms.) Michelle M. Davis
Case Manager

## NO. 00-3313
## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

FILED
NOV - 1 2000
LEONARD GREEN, Clerk

**JAMES F. LOVE** )
*Petitioner-Appellant,* )
v. )
**HAROLD CARTER, Warden,** )
*Respondent-Appellee.* )

## ORDER

Before: DAUGHTREY and CLAY, Circuit Judges; RUSSELL, District Judge.[1]

James F. Love has filed a motion for reconsideration of this court's order entered July 5, 2000, which denied his application for a certificate of appealability to appeal a district court order denying habeas relief under 28 U.S.C. §2254.

Upon consideration, the court has concluded that it did not act under any misapprehension of law or fact in its order entered July 5, 2000. *See* Fed.R.App.P. 40(a). Accordingly, the motion for reconsideration is denied. All remaining motions are denied as moot.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Clerk

---

[1] The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

**IN THE**
**SIXTH CIRCUIT COURT OF APPEALS**

**APPEAL NO. 00-3313**

**JAMES F. LOVE,**
***Appellant,***

**vs.**

**HAROLD CARTER, WARDEN,**
***Appellee.***

RECEIVED
OCT 1 0 2000
LEONARD GREEN, Clerk

## MOTION TO SUPPLEMENT THE RECORD

Now comes Appellant, James Love, by and through counsel, and hereby moves this Honorable Court to allow Appellant to submit the attached original Affidavits referenced in his original Motion to Expand the Record filed with this Court on September 14, 2000. The attached Affidavits are from Angela Peal, Dr. Pamela Hanson and author Lynn Freed.

Respectfully Submitted,
/s/ William R. Gallagher
WILLIAM R. GALLAGHER (0064683)
Attorney for Appellant
The Citadel
114 East Eighth Street
Cincinnati, Ohio 45202
(513) 651-5666

# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. Mail to M. Scott Criss, Assistant Attorney General, Corrections Litigation Division, 140 E. Town Street, 14th Floor, Columbus, Ohio 43215 this 10 day of October, 2000.

/s/ William R. Gallagher
WILLIAM R. GALLAGHER (0064683)

# AFFIDAVIT

STATE OF WEST VIRGINIA )
)
COUNTY OF PUTNAM ) SS:

I, ANGELA PEAL,

after first being duly sworn and cautioned, hereby state and depose as follows:

1. I know James F. Love.

2. I spoke with him on the telephone on March 12, 1989 when I accepted a collect call from him.

3. When I received my phone bill, I noticed the call originated in Mexico which is where Mr. Love told me he was when we spoke on March 12, 1989.

4. In May, 2000, I discovered some old date books and diaries I had stored away. Included in my date books was an entry on March 12, 1989 where I noted Mr. Love's call.

5. I removed the page and forwarded it for use by Mr. Love's attorneys. (Exhibit 1.)

Further Affiant Sayeth Naught.

/s/ Angela Peal
ANGELA PEAL

SWORN TO and subscribed before me, a Notary Public for the State of West Virginia, personally came Angela Peal this 1st day of October, 2000.

B. DIANE EDWARDS
My Commission Expires August 10, 2001

/s/ B. Diane Edwards
NOTARY PUBLIC
My Commission Expires:
Aug 10, 2001

| 1989 | |
|---|---|
| F | S |
| 5 | 6 |
| 12 | 13 |
| 19 | 20 |
| 26 | 27 |

| 1989 | | | JUNE | | | 1989 |
|---|---|---|---|---|---|---|
| S | M | T | W | T | F | S |
| | | | | 1 | 2 | 3 |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | |

| 1989 | | | JULY | | | 1989 |
|---|---|---|---|---|---|---|
| S | M | T | W | T | F | S |
| | | | | | | 1 |
| 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| 16 | 17 | 18 | 19 | 20 | 21 | 22 |
| 23/30 | 24/31 | 25 | 26 | 27 | 28 | 29 |

**RSDAY 9**
**MARCH**
68/297

ike didn't say anything to me

**RIDAY 10**
**MARCH**
69/296

ke not here - Petersburg Va.

**JRDAY 11**
**MARCH**
70/295

**SUNDAY 12**
**MARCH**
71/294

Jim Love
called from
Mexico.

# AFFIDAVIT

STATE OF OHIO )
)
COUNTY OF HAMILTON )

I, Dr. Pamela Hanson, after first being duly sworn and cautioned, hereby state and depose as follows:

1. I, Pamela Hanson, am a medical doctor licensed to practice medicine in the State of Ohio.

2. A review of my medical records, and billing statements verifies Mr. James Love was seen in my office on November 11, 1988 and received an injection in preparation for a trip out of the country.

3. The attached records are true and accurate regarding the services rendered to Mr. Love by my medical office.

Further Affiant Sayeth Naught.

/s/ Pamela J. Hanson, M.D.
DR. PAMELA HANSON

Sworn to and subscribed before me, a Notary Public, personally came Dr. Pamela Hanson this 14 day of September, 2000.

/s/ Sharon F. Mullen
NOTARY PUBLIC

SHARON F. MULLEN
Notary Public, State of Ohio
My Commission Expires April 8, 2005

## STATEMENT

**DRYER AND HANSON FAMILY PRACTICE, INC.**
POWELL CROSLEY PROFESSIONAL BUILDING
2270 BANNING ROAD
CINCINNATI, OH 45239

513-853-5800

CHARGES OR
PAYMENTS MADE
AFTER LAST DATE
SHOWN WILL APPEAR
ON YOUR NEXT
STATEMENT

Mr. James Love
6076 Sheed Road
Cincinnati, Ohio 45247

BALANCE FORWARD: None

None

| DATE / FAMILY MEMBER | DESCRIPTION | TOTAL FEE | CREDITS: PAYMENTS | CREDITS: ADJ. | BALANCE |
|---|---|---|---|---|---|
| 10-27-88 | James. A2 | 25 00 | 25 00 | | -0- |
| 11-11-88 | James A1, F1, 2, 3 | 51 00 | 51 00 | | -0- |
| 8-14-89 | James. A2 | 25 00 | 25 00 | | -0- |
| 8-22-89 | James. A, E 13.91.82 | 65 00 | - | | 65 00 |
| | | | | | |
| | | | | | |
| | | | | | |
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| | | | | | |
| | | | | | |

[illegible] S.W. PROFESSIONAL FORMS & SYSTEMS [illegible] LITHO IN U.S.A. [illegible]

# fax cover sheet

University of Cincinnati
4350
Department of Family Medicine
Residency Training &
International Health Programs
2446 Kipling Avenue
Cincinnati, OH 45239

Phone: 513-853-

Fax: 513-541-3902

DATE: 5/23/00

TO: Wm. R. Gallagher Esq 651 5688

FROM: Pamela Hansen MD

PAGES: 9

COMMENT: Re: James Love

Here are the copies of my chart notes

I am still trying to locate the billing records. The copies in this packet were sent to me by Mr. Love. I would be willing to attest that they are true copies — I recognize my own handwriting and that of my bookkeeper and office Manager

I am leaving my job at the end of this week and going to Europe for a month. You can reach me at my home after July 10 – 54[illegible]-4913 – We can do the affidavit when I get back. You can page me up to 6pm on 5/26/00 – 554-7891 – if any questions

677 P01 MAY 23 '00 15:29

James F. Love

JAN - 6 1988  Cathy Kidwell

WT 152 1/2  BP 96/56
HT 5'8"  HR 72 reg.
TEMP ______ HC ______

S - Notices a growth upper right leg, 1st noticed at least a week ago. Also has a place right below rt knee. Has small lumps various area of body. Also wants something to help him sleep, works late hours - can't unwind after work, stresses out at work. staggered shifts

Meds
none

Insom-
concerned
about AIDS,
toxins

O: Post inflammatory pigmented macules
Ⓡ Post thigh + Lat knee
Subcutaneous nodule Ⓛ volar forearm

A/P Postinflammatory hyperpigmentation
prob lipoma  observe for Δ in size etc
RTC for PE

JAN 1 3 1988

cxl R.S.

HT ______ ______
TEMP ______ HC ______

JAN 2 0 988

WT ______ ______
HT ______ ______
TEMP ______ HC ______

James Love

JAN 20 1988

[illegible] R.S

WT 151 100/68

HT 5'8" 60 reg.

TEMP _____ HC _____

JAN 25 1988

S. Physical - doing better now

High frequency hearing loss c̄ tinnitus

GENERAL APPEARANCE

PHYSICAL EXAM

| | | |
|---|---|---|
| Head, Scalp | ☐ | ☑ |
| Lids-Sclera-Conj | ☐ | ☑ |
| Eye Muscles | ☐ | ☑ |
| Pupils | ☐ | ☑ |
| Fundi | ☐ | ☑ |
| Ears | ☐ | ☑ |
| Nose / Sinuses | ☐ | ☑ |
| Teeth / Gums | ☐ | ☑ |
| Pharynx | ☐ | ☑ |
| Thyroid | ☐ | ☑ |
| Neck Glands | ☐ | ☑ |
| Carotid Bruits | ☐ | ☑ |
| Chest-Lungs | ☐ | ☑ |
| Heart-Apex (Location) | | ☑ |
| Heart Sound | ☐ | ☑ |
| Murmurs / Thrills | ☐ | ☑ |
| Breasts & Nipples | ☐ | ☑ |
| Axillary Nodes | ☐ | ☑ |
| Abdominal Masses | ☐ | ☑ |
| Abdominal Tend | ☐ | ☑ |
| Liver / Spleen | ☐ | ☑ |
| Abdominal Bruits | ☐ | ☐ |

| | | | |
|---|---|---|---|
| Hernial Rings | | ☑ | ☐ |
| Inguinal Nodes | | ☑ | ☐ |
| Pulses - Femoral | ☐ | ☐ | ☐ |
| Popliteal | ☐ | ☐ | ☐ |
| Post Tibial | ☐ | ☐ | ☐ |
| Dorsalis Pedis | ☐ | ☐ | ☐ |
| Varicose Veins | | ☐ | ☐ |
| Pedal Edema | | ☑ | ☐ |
| ♀ - Vulva / Vagina | | ☐ | ☐ |
| Adnexae | | ☐ | ☐ |
| Cervix | | ☐ | ☐ |
| Uterus | | ☐ | ☐ |
| Uretra / Rectocele | | ☐ | ☐ |
| Pap Test (done) | | ☐ | ☐ |
| Genitalia - (Male) | | ☑ | ☐ |
| - Prostate | | ☐ | ☐ |
| Anal/Rectal | | ☐ | ☐ |
| Sigmoidoscopy | | | |
| Skin Lesions | | ☑ | ☐ |
| Nail Beds - Fingers | | ☑ | ☐ |
| - Toes | | ☑ | ☐ |

Urinalysis

Leuk. neg Bld. neg

Nit. neg SG. 1030

Uro. normal Ket. neg

Prot. neg Bili. neg

PH. 5.5 Gluc. neg

Neuro intact

ECG Normal

CHEST X RAY

PULM FUNCT

[illegible] Nl exam

Resume Exercise
quit smoking

677 P03 MAY 23 '88 15:29

James Love

9/22 Pt called in – NB called – NB

**PHONE MESSAGE** FOR: Dr. Hanson

M James Love – 563-4298

☒ Telephoned ☐ Returned your call

☐ Will call again [✓ Please return the call]

[illegible]

— Said he pulled a muscle in his back 3 days ago. Slept wrong on that on his back now. Doesn't want come in, can't afford it. No longer [illegible]

Phone Sagent – 563-0912 Date 9/22/88 Time 2:10 By [illegible]

Wants script for Pt some pain pill.

Form 23007 · [illegible] Systems, Inc. Champaign, IL 61820

---

**PHONE MESSAGE** FOR: Hanson

M James Love of

[✓ Telephoned] ☐ Returned your call ☐ Came in

☐ Will call again ☒ Please return the call ☐ See me

— Going to spend vacation in Old Mexico should he get any shots or take anything?

Oren

Phone 681-5188 or 385-4568 Date 11-8-88 Time 11:30 By Jm

Form 23007 · [illegible] Systems, Inc. Champaign, IL 61820

---

OCT 27 1988

S- URI x 1wk
Had a fever + broke 3 days ago   Tactile fever
Bad cough - coughed up green + brown phlegm. No SOB

O: Ears OK
Throat red
Neck no nodes
Lungs clear

A/P Sinusitis/bronchitis
PCE   RR ↓. no impr

NOV 11 1988

WT 165 3/4 BP 108/68
HT ____ HR 88 reg
TEMP ____ HC ____

S- Going to Old Mexico, wants whatever shots you think he needs.

Ixtapa – 1 week to 6 years
prob will live in local housing
W Sunday – plans to avoid being out at night

P: Gamma globulin 2cc IM
Chloroquine q week
dT / OPV boosters

ORAL Polio
&

BAKER & HANSON FAMILY PRACTICE, INC.
VACCINE DT
MANUFACTURER Sclavo
LOT # 123 B3
GIVEN BY K.W. Ⓛ [illegible]

Gamma Globulin given Ⓛ deltoid K.W.

James Love

AUG 1 4 1989

WT 160 BP 102/68
HT HR 72 reg.
TEMP HC
Med
None

PHONE MESSAGE FOR: Dr. [illegible]

M Jim Love of

☑ Telephone ☐ Returned your call ☐ Came in
☐ Will call again 2 ☐ Please return the call ☐ See me

Message Jim said he was in Mexico + got Herpes Simplex B. Doctor down there gave him Dipresone-Y. Wants to talk to you about what to do [illegible]

Phone 741-9125 Date 8/12/89 Time 10:45 By M.C.

[illegible] medication

[illegible] on leg

concerned

S. Has [illegible] he thinks he has symptoms.

started around May '89.
Has little spots that don't heal on various areas of his body.
Takes very long for them to heal
Itches all the time (tiny little blisters) can't hardly see them.
Itching is worse @ noc.

Dr. in Mexico diagnosed him as having Herpes Simplex B.

first noticed in May on genitalia - started as flesh-colored papules - then get red + itchy water blisters + dry up - but last for several months
went away with dipresone
recurred 3-4 days ago

O: Excoriated papules on extremities, penis, scrotum

A/P NOT Herpes
trial Lidex

Derm ref if no impr

James Love

AUG 22 1989

WT 160 BP ______
HT ______ HR ______
TEMP ______ HC ______

S – Red bumps in groin area spreading – itch bad. Lidex no help. also axilla
Bumps appear purple now instead of red as before.

O: Purpuric nodules thighs, shaft of penis

A/P ?? erythema nodosum vs. ?
derm ref.

---

PHONE MESSAGE FOR: HANSON
M JAMES LOVE of
☒ Telephoned ☐ Returned your call ☐ Came in
☐ Will call again ☒ Please return the call ☐ See me
Message: Wants to know what to do now? medication not helping.
Refer to Dr. Steven Rosner
Phone 741-9125 Date 8-21-89 Time 10:35 By

FORM 23007 - Colwell Systems, Inc., Champaign, IL 61820

---

Message: I called pt and he wants to talk to you before seeing Dr. Rosner. will be home later in afternoon 8/22
Phone 741-9125 Date 8/22/89 Time 6:00 By TK

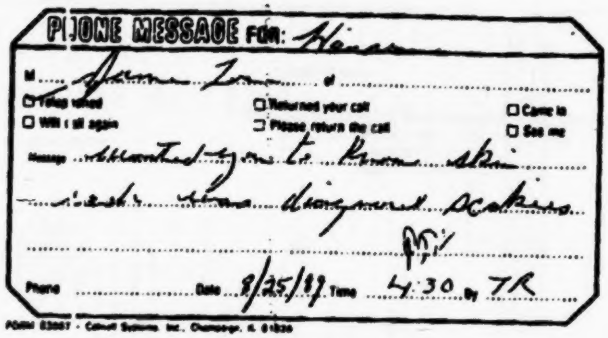
FORM 23007 - Colwell Systems, Inc., Champaign, IL 61820

---

PHONE MESSAGE FOR: HANSON
M James Love of
☒ Telephoned ☐ Returned your call ☐ Came in
☐ Will call again ☒ Please return the call ☐ See me
Message: had red bumps ~~now~~ they are purple. Said he thinks you should see him again. OK
after late morning
Phone 741-9125 Date 8-21-89 Time 9:03 By

FORM 23007 - Colwell Systems, Inc., Champaign, IL 61820

James Love



PHONE MESSAGE FOR: Heise

M James Love of

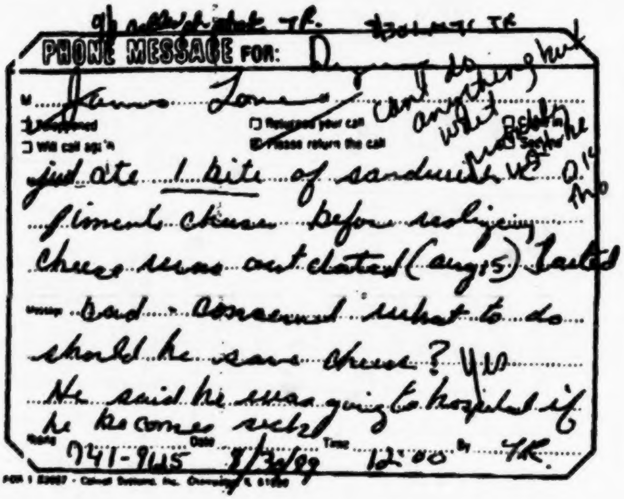
☒ Telephoned ☐ Returned your call ☐ Came in

☐ Will call again ☐ Please return the call ☐ See me

Message wanted you to know skin rash was diagnosed scabies

Phone Date 8/25/89 Time 4:30 By TR

FORM 83087 - Colwell Systems, Inc., Champaign, IL 61820



g/h called [illegible] TR. [illegible] TR

PHONE MESSAGE FOR: D

M James Love

can't do anything but wait watch closely

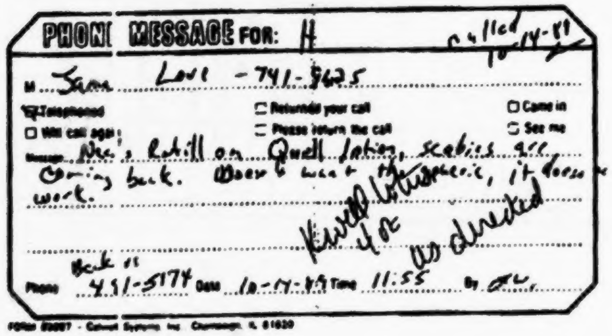
☒ Telephoned ☐ Returned your call ☐ Came in

☐ Will call again ☒ Please return the call ☐ See me

Message just ate 1 bite of sandwich w/ pimento cheese before realizing cheese was outdated (aug 15) tasted bad - concerned what to do should he save cheese? yes He said he was going to hospital if he becomes sick

Phone 741-9645 Date 8/30/89 Time 12:00 By TR.

FORM 83087 - Colwell Systems, Inc., Champaign, IL 61820



PHONE MESSAGE FOR: H

called 10-14-89

M James Love - 741-8625

☒ Telephoned ☐ Returned your call ☐ Came in

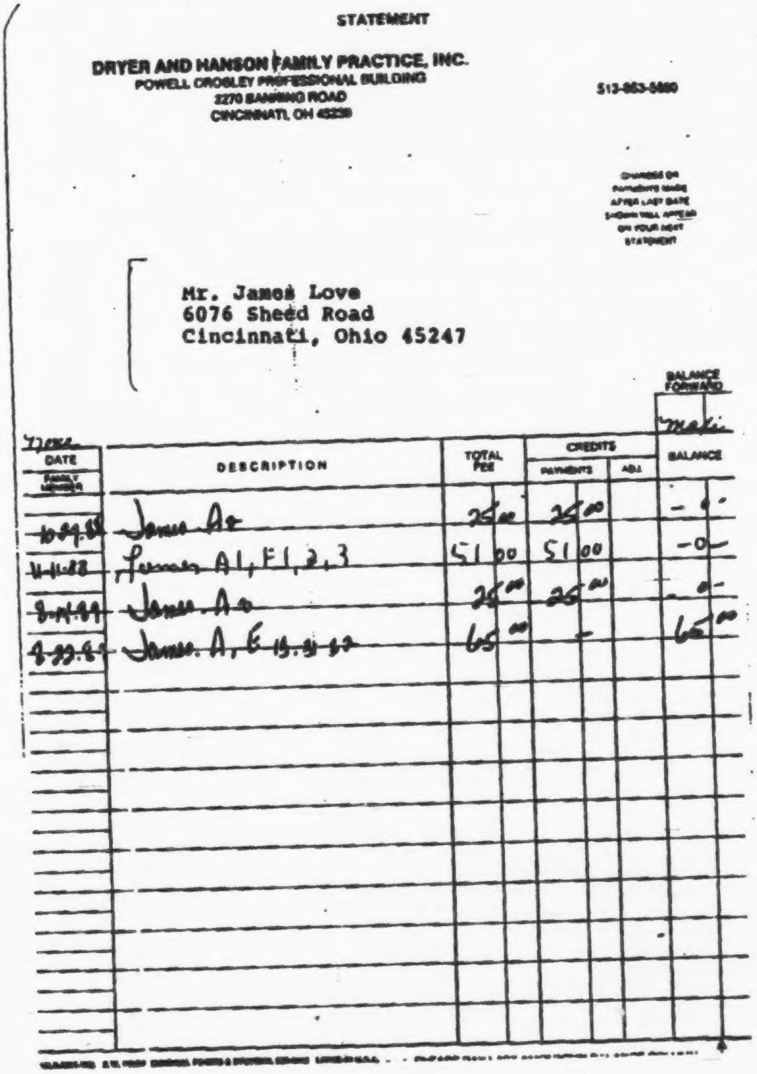
☐ Will call again ☐ Please return the call ☐ See me

Message Needs Refill on Quell lotion, scabies are coming back. Doesn't want the generic, it doesn't work.

Kwell lotion 4 oz as directed

Phone Back # 451-5174 Date 10-14-89 Time 11:55 By [illegible]

FORM 83087 - Colwell Systems, Inc., Champaign, IL 61820



STATEMENT

**DRYER AND HANSON FAMILY PRACTICE, INC.**
POWELL CROSLEY PROFESSIONAL BUILDING
2270 BANNING ROAD
CINCINNATI, OH 45239

513-853-5880

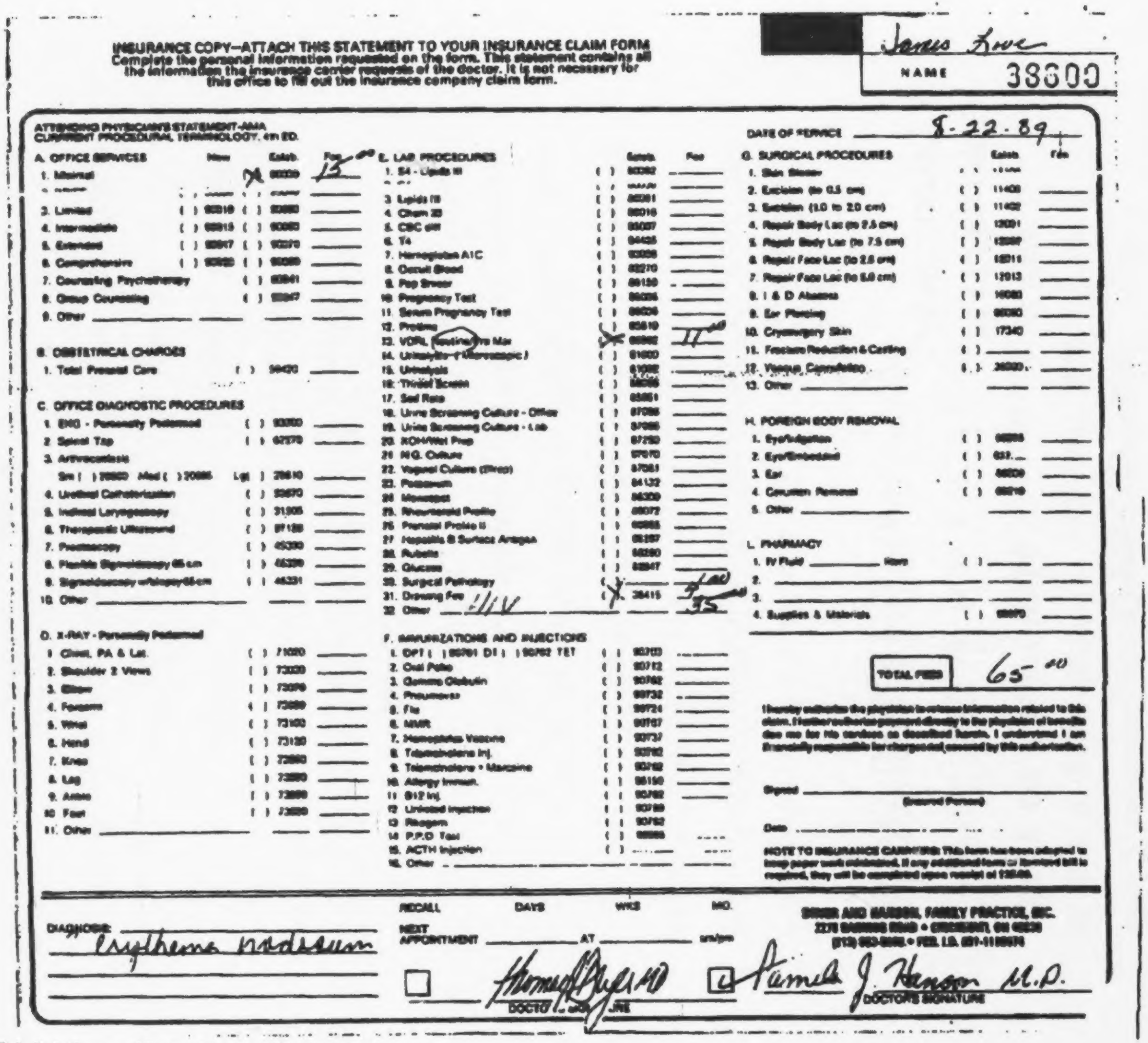
CHARGES OR PAYMENTS MADE AFTER LAST DATE SHOWN WILL APPEAR ON YOUR NEXT STATEMENT

Mr. James Love
6076 Sheed Road
Cincinnati, Ohio 45247

Love

BALANCE FORWARD [illegible]

| DATE<br>FAMILY MEMBER | DESCRIPTION | TOTAL FEE | CREDITS<br>PAYMENTS | ADJ. | BALANCE |
|---|---|---|---|---|---|
| 10-29-88 | James A0 | 25 00 | 25 00 | | -0- |
| 11-11-88 | James A1, F1,2,3 | 51 00 | 51 00 | | -0- |
| 8-14-89 | James A0 | 25 00 | 25 00 | | -0- |
| 8-29-89 | James A, E 19, 21 22 | 65 00 | - | | 65 00 |



[redacted]

James Love
NAME 38600

**INSURANCE COPY—ATTACH THIS STATEMENT TO YOUR INSURANCE CLAIM FORM**
Complete the personal information requested on the form. This statement contains all the information the insurance carrier requests of the doctor. It is not necessary for this office to fill out the insurance company claim form.

ATTENDING PHYSICIAN'S STATEMENT-AMA
CURRENT PROCEDURAL TERMINOLOGY, 4th ED.

DATE OF SERVICE 8-22-89

| A. OFFICE SERVICES | New | Estab. | Fee |
|---|---|---|---|
| 1. Minimal | | ☒ [illegible] | 15.00 |
| 2. [illegible] | ( ) [illegible] | ( ) [illegible] | |
| 3. Limited | ( ) [illegible] | ( ) [illegible] | |
| 4. Intermediate | ( ) [illegible] | ( ) [illegible] | |
| 5. Extended | ( ) [illegible] | ( ) [illegible] | |
| 6. Comprehensive | ( ) [illegible] | ( ) [illegible] | |
| 7. Counseling Psychotherapy | | ( ) [illegible] | |
| 8. Group Counseling | | ( ) [illegible] | |
| 9. Other | | | |

| B. OBSTETRICAL CHARGES | | | |
|---|---|---|---|
| 1. Total Prenatal Care | ( ) | [illegible] | |

| C. OFFICE DIAGNOSTIC PROCEDURES | | | |
|---|---|---|---|
| 1. EKG - Personally Performed | ( ) | [illegible] | |
| 2. Spinal Tap | ( ) | [illegible] | |
| 3. Arthrocentesis Sm ( ) [illegible] Med ( ) [illegible] Lg ( ) | | [illegible] | |
| 4. Urethral Catheterization | ( ) | [illegible] | |
| 5. Indirect Laryngoscopy | ( ) | 31505 | |
| 6. Therapeutic Ultrasound | ( ) | [illegible] | |
| 7. Proctoscopy | ( ) | [illegible] | |
| 8. Flexible Sigmoidoscopy 65 cm | ( ) | [illegible] | |
| 9. Sigmoidoscopy w/biopsy 65 cm | ( ) | 45331 | |
| 10. Other | | | |

| D. X-RAY - Personally Performed | | | |
|---|---|---|---|
| 1. Chest, PA & Lat. | ( ) | 71020 | |
| 2. Shoulder 2 Views | ( ) | [illegible] | |
| 3. Elbow | ( ) | [illegible] | |
| 4. Forearm | ( ) | [illegible] | |
| 5. Wrist | ( ) | 73100 | |
| 6. Hand | ( ) | 73120 | |
| 7. Knee | ( ) | [illegible] | |
| 8. Leg | ( ) | [illegible] | |
| 9. Ankle | ( ) | [illegible] | |
| 10. Foot | ( ) | [illegible] | |
| 11. Other | | | |

| E. LAB PROCEDURES | | Estab. | Fee |
|---|---|---|---|
| 1. S4 - Lipids III | ( ) | [illegible] | |
| 2. [illegible] | ( ) | [illegible] | |
| 3. Lipids III | ( ) | [illegible] | |
| 4. Chem 20 | ( ) | [illegible] | |
| 5. CBC diff | ( ) | [illegible] | |
| 6. T4 | ( ) | [illegible] | |
| 7. Hemoglobin A1C | ( ) | [illegible] | |
| 8. Occult Blood | ( ) | [illegible] | |
| 9. Pap Smear | ( ) | [illegible] | |
| 10. Pregnancy Test | ( ) | [illegible] | |
| 11. Serum Pregnancy Test | ( ) | [illegible] | |
| 12. Prothrombin | ( ) | [illegible] | |
| 13. VDRL, [✓ Routine] [illegible] | ☒ | [illegible] | 11.00 |
| 14. Urinalysis (Microscopic) | ( ) | [illegible] | |
| 15. Urinalysis | ( ) | [illegible] | |
| 16. Thyroid Screen | ( ) | [illegible] | |
| 17. Sed Rate | ( ) | [illegible] | |
| 18. Urine Screening Culture - Office | ( ) | [illegible] | |
| 19. Urine Screening Culture - Lab | ( ) | [illegible] | |
| 20. KOH/Wet Prep | ( ) | [illegible] | |
| 21. N.G. Culture | ( ) | [illegible] | |
| 22. Vaginal Culture (Prep) | ( ) | [illegible] | |
| 23. Potassium | ( ) | [illegible] | |
| 24. Monospot | ( ) | [illegible] | |
| 25. Rheumatoid Profile | ( ) | [illegible] | |
| 26. Prenatal Profile II | ( ) | [illegible] | |
| 27. Hepatitis B Surface Antigen | ( ) | [illegible] | |
| 28. Rubella | ( ) | [illegible] | |
| 29. Glucose | ( ) | [illegible] | |
| 30. Surgical Pathology | ( ) | | 4.00 |
| 31. Drawing Fee HIV | ☒ | 36415 | 35 |
| 32. Other | | | |

| F. IMMUNIZATIONS AND INJECTIONS | | | |
|---|---|---|---|
| 1. DPT ( ) [illegible] DI ( ) [illegible] TET | ( ) | [illegible] | |
| 2. Oral Polio | ( ) | 90712 | |
| 3. Gamma Globulin | ( ) | [illegible] | |
| 4. Pneumovax | ( ) | 90732 | |
| 5. Flu | ( ) | 90724 | |
| 6. MMR | ( ) | [illegible] | |
| 7. Hemophilus Vaccine | ( ) | 90737 | |
| 8. Triamcinolone Inj. | ( ) | [illegible] | |
| 9. Triamcinolone + Marcaine | ( ) | [illegible] | |
| 10. Allergy Immun. | ( ) | [illegible] | |
| 11. B12 Inj. | ( ) | [illegible] | |
| 12. Unlisted Injection | ( ) | [illegible] | |
| 13. Rhogam | ( ) | [illegible] | |
| 14. P.P.D. Test | ( ) | [illegible] | |
| 15. ACTH Injection | ( ) | | |
| 16. Other | | | |

| G. SURGICAL PROCEDURES | | Estab. | Fee |
|---|---|---|---|
| 1. Skin Biopsy | ( ) | [illegible] | |
| 2. Excision (to 0.5 cm) | ( ) | 11400 | |
| 3. Excision (1.0 to 2.0 cm) | ( ) | 11402 | |
| 4. Repair Body Lac (to 2.5 cm) | ( ) | 12001 | |
| 5. Repair Body Lac (to 7.5 cm) | ( ) | [illegible] | |
| 6. Repair Face Lac (to 2.5 cm) | ( ) | [illegible] | |
| 7. Repair Face Lac (to 5.0 cm) | ( ) | 12013 | |
| 8. I & D Abscess | ( ) | [illegible] | |
| 9. Ear Piercing | ( ) | [illegible] | |
| 10. Cryosurgery Skin | ( ) | 17340 | |
| 11. Fracture Reduction & Casting | ( ) | | |
| 12. Venous Cannulation | ( ) | [illegible] | |
| 13. Other | | | |

| H. FOREIGN BODY REMOVAL | | | |
|---|---|---|---|
| 1. Eye/Irrigation | ( ) | [illegible] | |
| 2. Eye/Embedded | ( ) | [illegible] | |
| 3. Ear | ( ) | [illegible] | |
| 4. Cerumen Removal | ( ) | [illegible] | |
| 5. Other | | | |

| L. PHARMACY | | | |
|---|---|---|---|
| 1. IV Fluid ______ Hours | ( ) | | |
| 2. | | | |
| 3. | | | |
| 4. Supplies & Materials | ( ) | [illegible] | |

TOTAL FEES 65.00

I hereby authorize the physician to release information related to this claim. I further authorize payment directly to the physician of benefits due me for his services as described herein. I understand I am financially responsible for charges not covered by this authorization.

Signed ______________________
(Insured Person)

Date ______________________

NOTE TO INSURANCE CARRIERS: This form has been adopted to keep paper work minimized. If any additional form or itemized bill is required, they will be completed upon receipt of [illegible].

DIAGNOSIS: Erythema nodosum

RECALL DAYS WKS MO.

NEXT APPOINTMENT ______ AT ______ am/pm

☐ Thomas [illegible] MD
DOCTOR'S SIGNATURE

☑ Pamela J. Hanson M.D.
DOCTOR'S SIGNATURE

[illegible] AND HANSON, FAMILY PRACTICE, INC.
[illegible] • CINCINNATI, OH [illegible]
(513) [illegible] • FED. I.D. [illegible]

# AFFIDAVIT

**STATE OF CALIFORNIA ) IN THE**
**) MATTER OF**
**) JAMES LOVE**
**COUNTY OF SAN FRANSICO ) SS:**

I, LYNN FREED, after first being duly sworn and cautioned, hereby state and depose as follows:

1. I am Lynn Freed and I am author the Author of the novel HOME GROUND.
2. I aver that the attached Exhibit A is a copy of the title page of my novel HOME GROUND.
3. I aver that the handwriting saying, "For Jim Love, With love and good luck for your own book. Lynn Freed. Zihuatanejo, Dec. '88" on the attached Exhibit A is mine.
4. I aver that the signature on the attache Exhibit A is mine.
5. I was in Zihuatanejo, Mexico arriving on December 5, 1988 and left on December 8, 1988.

6. I signed the book between December 5, 1988 and December 8, 1988 when I was in Zihuatanejo, Mexico.

7. I stayed at a hotel on Playa La Ropa in Zihuatanejo, Mexico during that time with a friend.

8. While in Zihuatanejo, I was introduced to a man staying down the beach who himself was reportedly working on a book. I do not recall his name at this time.

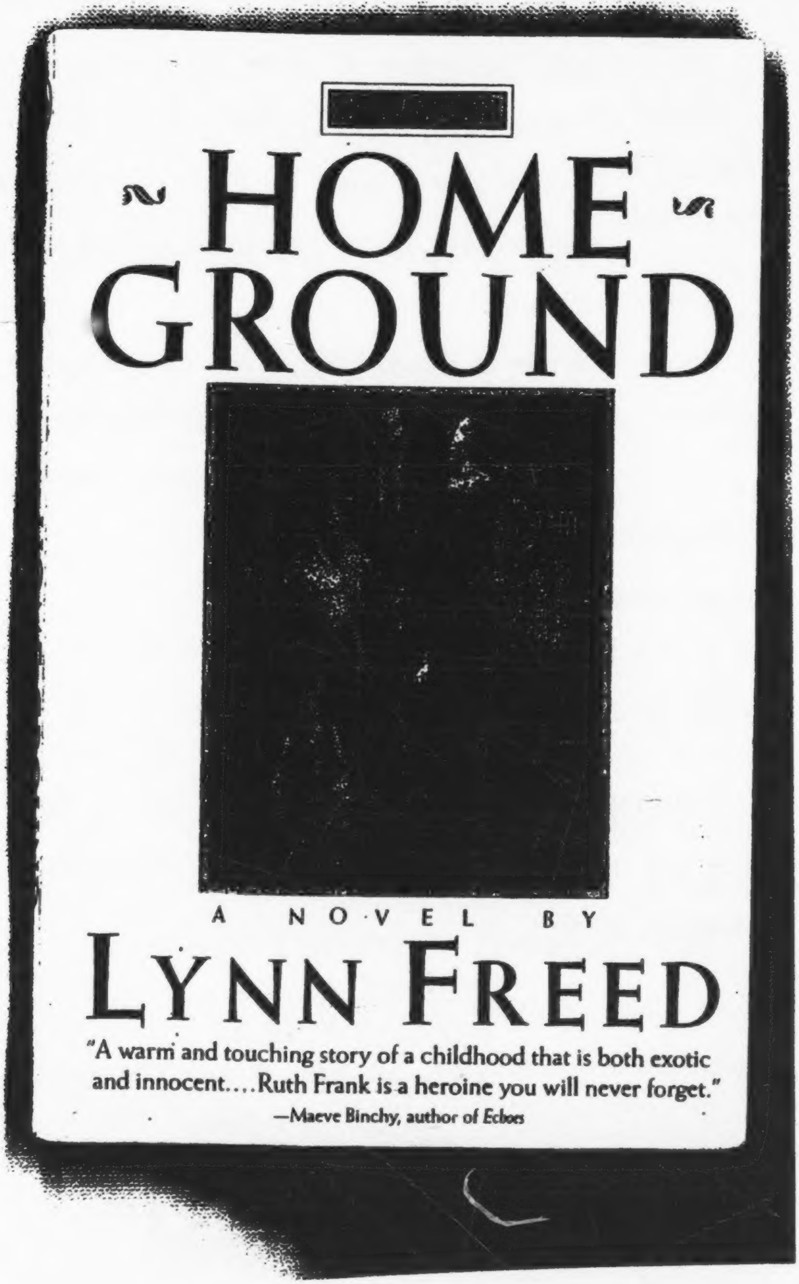
Further Affiant Sayeth Naught.

/s/ Lynn Freed
LYNN FREED

SWORN to and subscribed before me, a Notary Public for the State of California, this 19th day on September, 2000.

/s/ Bruce Linton
NOTARY PUBLIC
My commission Expires: 4/29/04

BRUCE LINTON
Commission # [illegible]
Notary Public - California
San Francisco County
My Comm. Expires Apr 29, 2004

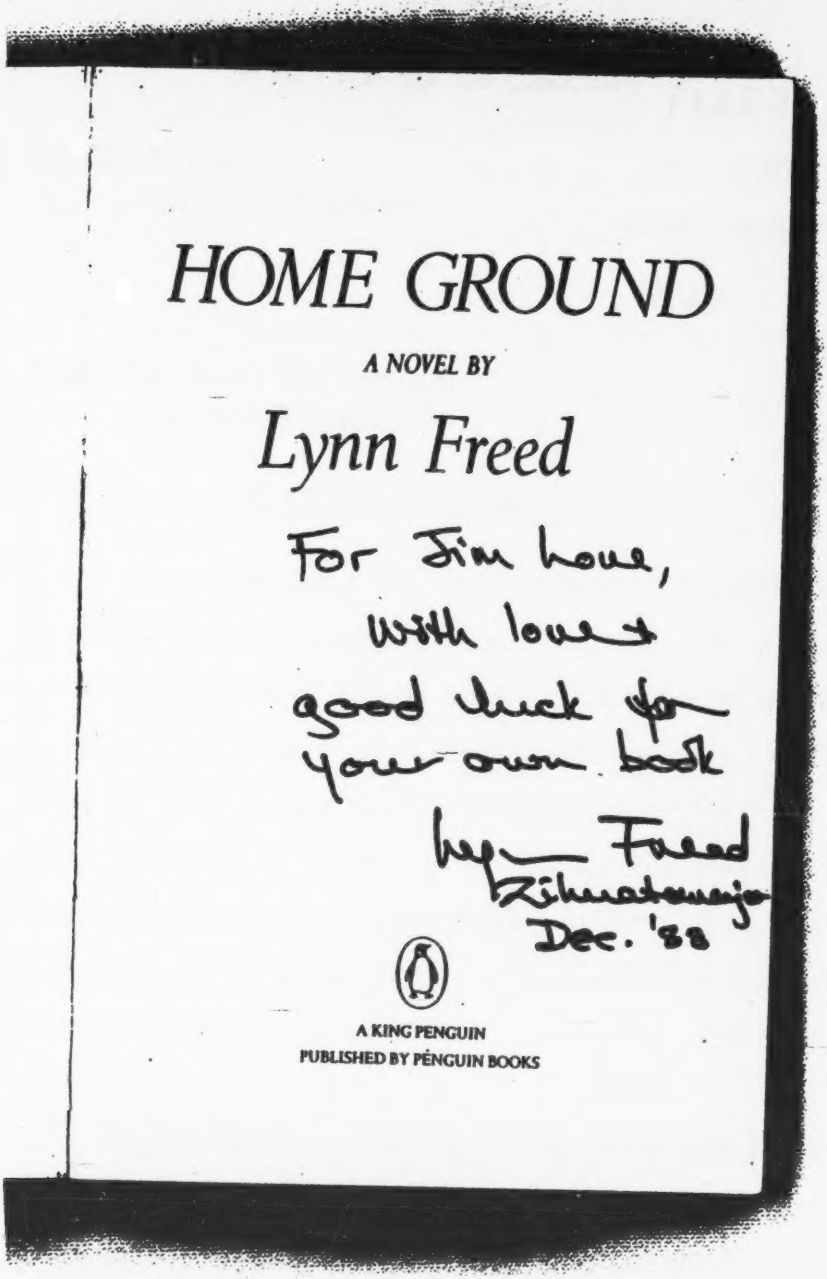


HOME
GROUND

A NOVEL BY

LYNN FREED

"A warm and touching story of a childhood that is both exotic and innocent....Ruth Frank is a heroine you will never forget."
—Maeve Binchy, author of *Echoes*



# HOME GROUND

A NOVEL BY

Lynn Freed

For Jim Houe,
With love &
good luck for
your own book
Lynn Freed
Zihuatanejo
Dec. '88

A KING PENGUIN
PUBLISHED BY PENGUIN BOOKS

**NO. 00-3313**

## UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

FILED
JUL -5 2000
LEONARD GREEN, Cle

**JAMES F. LOVE** )
***Petitioner-Appellant,*** )
)
**v.** )
)
**HAROLD CARTER, Warden,** )
***Respondent-Appellee.*** )

**ORDER**

Before: MARTIN, Chief Judge.

James Franklin Love, an Ohio prisoner represented by counsel, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The filing of the notice of appeal has been construed as an application for a certificate of appealability. *Cf.* Fed. R.App.P. 22(b). Love has filed a motion to remand the certificate of appealability to the district court with instructions to reconsider it in light of the recent Supreme Court decision of *Slack v. McDaniel*, 120 S.Ct. 1595 (2000).

Upon review, the court has considered the application for a certificate of appealability in light of *Slack* and denies the application as to the issues not certified by the district court.

The motion to remand is therefore denied as moot. A briefing schedule shall issue as to the claim certified by the district court, *i.e..*, whether the state trial court admitted other acts evidence in violation of the Due Process Clause and the Double Jeopardy Clause.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Clerk

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF OHIO
## WESTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK

00 OCT 19 PM 2:40

U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

**JAMES FRANKLIN LOVE,**
***Petitioner,***

vs

**HAROLD CARTER,**
***Respondent.***

Case No. C-1-98-777
(Weber, J.)

## ORDER

Petitioner, an inmate in state custody at the Southern Ohio Correctional Institution in Lucasville, Ohio brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 9, 2000, this Court denied petitioner's petition for a writ of habeas corpus, and also declined to issue a certificate of appealability. (Doc. 34). Upon reconsideration, this Court issued a certificate of appealability with respect to petitioner's first ground for relief alleged in his petition. (Doc. 43).

This matter is before the Court on petitioner's second motion for reconsideration of its decision to deny a certificate of appealability with respect to ground two through six of the petition and for an expanded certificate of appealability. (Doc. 44).

With respect to grounds two through six, petitioner has failed to raise any arguments which this Court has not already considered, reconsidered and rejected. (*See* Docs. 34, 43). Accordingly, the Court's decision to deny the certificate of appealability with respect to grounds two through six of the petition will stand.

Upon reconsideration, a certificate of appealability will not issue with respect to grounds two through six because with respect to these grounds, petitioner has failed to make a substantial showing of the denial of a constitutional right remediable in this federal habeas corpus proceeding. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Accordingly, petitioner's motion for reconsideration and for an expanded certificate of appealability (Doc. 44) is DENIED.

Date: 10/19/00

/s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

hr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
00 MAY -9 AM 9:32
DISTRICT COURT
WEST DIV CINCINNATI

**JAMES FRANKLIN LOVE,**
***Petitioner***

vs

**HAROLD CARTER,**
***Respondent.***

Case No. C-1-98-777
(Weber, J.)

# ORDER

Petitioner, an inmate in state custody at the Southern Ohio Correctional Institution in Lucasville, Ohio brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 9, 2000, this Court denied petitioner's petition for a writ of habeas corpus, and also declined to issue a certificate of appealability. (Docs. 36, 40, 41).

To secure a certificate of appealability, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3).

Although petitioner need not demonstrate that he will prevail on the merits, he must show: (1) the issues are debatable among reasonable jurists; (2) the appellate court could resolve issues differently; or (3) the questions presented are "adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 91983); *Trevino v. Johnson*, 168 F.3d 173, 177 (5th Cir.), *cert. denied*, 120 S.Ct.22 (1999). Upon further reflection, this court has decided to issue the certificate of appealability solely with respect to petitioner's first ground for relief which was that the state trial court had admitted other acts evidence in violation of the Due Process Clause and the Double Jeopardy Clause. Although petitioner is unlikely to succeed on the merits with respect to this issue, *see, e.g., Jordan v. Haunani-Henry*, No. 98-15844, 1999 WL 974178, at **3 (9th Cir. Oct. 22, 1999) and cases cited therein, *cert. denied*, 120 S.Ct. 1567 (2000), there is some possibility that the appellate court may view the claim differently. Therefore, upon further reflection, the Court will issue a certificate of appealability with respect to this one pivotal issue.

With respect to the other grounds for relief, petitioner has failed to raise any arguments which this Court has not already considered and rejected.

Accordingly, the Court's decision to deny the certificate of appealability with respect to grounds two through six of the petition will stand.

Petitioner's motion and supporting memorandum contained several inappropriate and untrue comments concerning the Court's Order in this case. Petitioner accused the Court of failing to review the entire state court record, of taking only three weeks to consider petitioner's extensive petition and of "drop[ping] the ball." (Doc. 41 at 18, 19, 27). In preparing the decision in this case, the Court extensively reviewed the record, as evidenced by the numerous citations to the transcript and other state court documents. The Court have sufficient time to this petitioner's case originally and on reconsideration, and affirms the denial of the writ of habeas corpus.

**IT IS THEREFORE ORDERED THAT:**

1. Upon reconsideration, a certificate of appealability will issue with respect to petitioner's first ground for relief but will not issue with respect to grounds two through six because with respect to the latter grounds, petitioner has failed to make a substantial showing of the denial of a constitutional right remediable in this federal habeas corpus proceeding. *See* 28 U.S.C. § 2253(c); Fed.R. App.P.22(b).

2. Petitioner's motion for reconsideration (docs. 36, 40, 41) is GRANTED with respect to petitioner's first ground for relief and is DENIED with respect to grounds two through six of the petition.

Date: 5/8/00

/s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

hr

# UNITED STATES DISTRICT COURT
# SOUTHERN DISTRICT OF OHIO
# WESTERN DIVISION

**James Franklin Love,**
***Petitioner,***

**vs.**

**Case No. C-1-98-777**
**(Weber, J.)**

**Stephen J. Huffman,**
***Respondent.***

## ORDER

Petitioner, an inmate in state custody at the Southern Ohio Correctional Institution in Lucasville, Ohio brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, as supplemented, respondent's answer, petitioner's reply (Docs. 1, 3,4, 9, 13); and petitioner's motions concerning expansion of the record, an evidentiary hearing, and discovery (Docs. 19, 21, 24, 25, 26, 30, 31); and petitioner's objections to the Magistrate Judge's Order denying expansion of the record (Doc. 20).

### Procedural Background

The 1986 term of the Hamilton County, Ohio grand jury indicted petitioner on one count of gross sexual imposition as defined in Ohio Rev. Code § 2907.05 (count one), one count of attempted rape as defined in Ohio Rev. Code § 2923.02 (count two) and one count of rape (vaginal intercourse) of a person under the age of thirteen by force, as defined in Ohio Rev. Code § 2907.02 (count three). (1986 case). (Doc. 1, Ex. P2). The indictment charged that the first two counts occurred on September 7, 1986, that the third count occurred on August 26, 1986 and that the victim was Jennifer Cotton. (*Id.*). The court granted petitioner's motion for judgment of acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure as to count 1, gross sexual imposition, and the jury returned a not guilty verdict as to count 2, attempted rape. (Doc. 1, Exs. P6, P8). The jury found petitioner guilty of rape but not guilty of the element of force, charged in count three. (Doc. 1, Ex. P7). On direct appeal the conviction was affirmed by the Ohio Court of Appeals ~~and the~~ Ohio Supreme Court declined to accept the case. (*See* Doc. 1, Ex. P16 at 2). On August 31, 1995, in a post-conviction proceeding, the state trial court vacated the judgment based on trial counsel's constitutional ineffectiveness in failing to move to suppress or exclude evidence regarding petitioner's 1982 convictions for auto theft and for sexually abusing his step-daughter. (*Id.*, Ex. P16).

On February 16, 1996, the Hamilton County, Ohio Grand Jury indicted petitioner on five counts of forceful rape of a child under thirteen years of age as defined in Ohio Rev. Code § 2907.02 and five counts of sexual battery as defined in Ohio Rev. Code § 2907.03, each with a prior offense of violence specification, specifically a 1982 Florida conviction for sexual assault of a child. (1996 case). (Doc. 1, Ex. P29). The indictment named the victim as Sarah Adams, and charged that the offenses occurred in 1988, 1989 and 1990 and involved cunnilingus, fellatio and vaginal intercourse. (*Id.*).

On May 10, 1996, the trial court granted the state's motion to join the 1996 case with the retrial of the 1986 case. (Doc. 1, Ex. P40). The retrial of the 1986 case involved the sole charge that petitioner raped, without force, a child under thirteen years of age, specifically Jennifer Cotton, on August 26, 1986. (*See id.*, Ex. P57). With respect to the 1996 case, the trial court granted petitioner's motions for judgment of acquittal pursuant to Rule 29 of the Ohio Rules of Criminal Procedure with respect to all five sexual battery counts and with respect to the rape count alleged to have occurred in Indiana (count 2). (*Id.*, Ex. P58 at 2 n.1; Ex. P52, Tr. 762, 764).

On June 5, 1996, a jury found petitioner guilty of one count of statutory rape involving Jennifer Cotton in August 1986 and of four counts of statutory rape with force involving Sarah Adams in 1988, 1989 and 1990. (Doc. 1, Exs. P27, P45-P48). The court sentenced petitioner to a prison term of eight to twenty-five years for the 1986 offense and to life imprisonment on each of the four counts in the 1996 case to be served consecutively to each other and to the sentence for the 1986 offense. (*Id.*, Exs. P28, P49).

On December 2, 1996, petitioner, with the assistance of counsel, appealed his convictions to the Ohio Court of Appeals, First Appellate District. In both cases, petitioner challenged the admission of evidence of his other acts and the joinder for trial of the 1986 and 1996 cases. (Doc. 1, Exs. P53, P54). With respect to the 1996 case, petitioner also challenged a jury instruction involving the terms "purpose" and "force." (*Id.*, Ex. P54). With respect to the 1986 case, petitioner challenged a jury instruction with respect to the date of the charged offense. (*Id.*, Ex. P53). He also assigned as error the trial court's denial of his motion to suppress and motion in limine with respect to evidence seized by police in connection with the September 7, 1986 incident and evidence relating to force as to the August 26, 1986 incident because he was acquitted of charges relating to that evidence in his first trial. (Doc. 1, Ex. P53).

Petitioner attempted to file a supplemental pro se brief raising issues of prosecutorial and judicial misconduct and challenging as error the trial court's denial of his motion for a mistrial. (Doc. 1, Exs. P65, P68). The Court of Appeals denied petitioner's motion to file his supplemental pro se brief. (*Id.*, Exs. P69, P71). Petitioner unsuccessfully appealed this denial to the Ohio Supreme Court and the United States Supreme Court. (*Id.*, Exs. P81, P84).

On June 4, 1997, the Ohio Court of Appeals overruled each of the assignments of error raised by petitioner's counsel and affirmed the trial court's judgment. (*Id.*, Exs. P57, P58). Petitioner further appealed his convictions to the Ohio Supreme Court raising essentially the same claims he had presented to the Ohio Court of Appeals with one addition. (*Id.*, Exs. P61, P62). In his final proposition of law, petitioner argued that the Ohio

Court of Appeals erred in denying his motion to file a pro se supplemental brief. (*Id.*). On October 15, 1997, the Ohio Supreme Court dismissed the appeal as "not involving any substantial constitutional question." (*Id.*, Exs. P63, P64).

Petitioner filed the instant petition for a writ of habeas corpus asserting the following grounds for relief:

**Ground one**: Conviction obtained by the use of inadmissible "other acts" evidence.

> The introduction of irrelevant, immaterial and highly prejudicial evidence of other acts at petitioner's trial--including a 14 year old prior conviction, evidence barred by the doctrine of direct estoppel, evidence barred by the doctrine of collateral estoppel, and evidence adduced by a misjoinder and/or prejudicial joinder of two, totally separate and unrelated indictments which could not have been joined in a single indictment--violated petitioner's rights to both substantive and procedural due process of law, the right to be free from double jeopardy and the right to fundamentally fair trials secured by the 5th, 6th and 14th Amendments to the Constitution of the United States.

**Ground two**: Misjoinder of indictments.

The consolidation of indictments rendered ten years apart, with different victims and different witnesses constituted misjoinder in violation of the petitioner's rights to fundamental fairness, community standards of fair play, a fundamentally fair trial and due process of law secured by the 5th, 6th, and 14th Amendments to the Constitution of the United States.

**Ground three**: Prejudicial joinder of indictments.

The petitioner was denied a fair trial and due process of law by the prejudicial joinder and consolidation of indictments in violation of the 5th, 6th and 14th Amendments to the Constitution of the United States.

**Ground four**: improper jury instructions.

The jury instruction, taken as a whole, instructed the jury to use the inadmissible "other acts" evidence to prove that the substantive charges of rape occurred and misdescribed an essential element of the force enhancement in a manner relieving the state of its burden of proof beyond a reasonable doubt on the force enhancement element, or, omitted an instruction on an essential element of the crimes charged, rising to structural error in violation of petitioner's rights to a fundamentally fair trial and due process of law, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

**Ground five**: Denial of Right to file a Pro Se Supplemental Brief and denial of the right to self-representation.

The denial of the petitioner's motion to file a pro se supplemental brief on direct appeal and to complete the record on appeal, denied the petitioner due process of law; a fundamentally fair appellate process, equal protection of the law; the right to self-representation on direct appeal; the fight to present all substantive errors appearing on the record of the trial for review on appeal; and the right to be free from judicial bias and prejudice, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

**Ground six**: Intentional prosecutorial and/or judicial misconduct.

> The petitioner was intentionally denied a fair trial and due process of law by intentional prosecutorial and/or judicial misconduct in violation of substantive due process of law, fundamental fairness, community standards of fair play and the fight to be free from arbitrary and capricious government conduct, and the fifth, sixth and fourteenth amendments to the Constitution of the United States.

(Doc. 1). In his return of writ, respondent asserts that petitioner's claims lack merit. (Doc. 9).

## OPINION

### I. Petitioner's claim that the trial court's admission of "other acts" evidence violated the Due Process Clause and the Double Jeopardy Clause, asserted in his first ground for relief, lacks merit.

In his first ground for relief, petitioner contends that the state trial court's admission of evidence concerning petitioner's sexual incidents with minors other than the incidents charged in the indictments and tried before the court violated petitioner's rights under the Due Process[1] and Double Jeopardy Clauses of the United States Constitution.

Petitioner asserts that the following evidence should have been excluded as "other acts" evidence with respect to the charge of statutory rape of Jennifer Cotton in August of 1986 (1986 case): 1. Evidence related to the 1982 Florida conviction for lewd and lascivious assault on a child which included the testimony of the victim, Leslie Saunders, and her mother, Anne Saunders; and a reference to the conviction in petitioner's statement to police; 2. Evidence related to the charges of gross sexual imposition and attempted rape of Jennifer Cotton on September 7, 1986 and evidence concerning use of force on Jennifer Cotton on August 26, 1986, all of which petitioner was acquitted in his first trial, including the testimony of Jennifer Cotton and her mother, Ruth Kegley concerning these events and spermicide and neckties found in petitioner's apartment on September 7, 1986; and 3. Evidence concerning the charges in the 1996 case, including the testimony of the victim, Sarah Adams, and her mother, Barbara Neal. Petitioner asserts that the following evidence should have been excluded as "other acts" evidence with respect to the charges of statutory rape with force of Sarah Adams in 1988, 1989 and 1990(1996 case): 1. Evidence related to the 1982 Florida conviction for lewd and lascivious assault on a child which included the testimony of the victim, Leslie Saunders, and her mother, Anne Saunders; and a reference to the conviction in petitioner's statement to police; 2. Evidence concerning the statutory rape charge in the 1986 case including the testimony of the victim, Jennifer Cotton, and her mother, Ruth Kegley; and 3. Evidence related to the charges of gross sexual imposition and attempted rape of Jennifer Cotton on September 7, 1986 and evidence concerning use of force on Jennifer Cotton on August 26,1986, all of which petitioner was acquitted in his first trial, including the testimony of Jennifer Cotton and her mother, Ruth Kegley concerning these events and spermicide and neckties found in petitioner's apartment on September 7, 1986.

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[1] Petitioner asserts, without elaboration or authority, that the admission of other acts evidence violated his right to "substantive" due process. (*See* Doc. 1, Memorandum at 47, 48). To prove a violation of substantive due process, petitioner must show that the state engaged in conduct which "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952) and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)); see *Pittsley v. Warish*, 927 F.3d 3, 6-9 (1st Cir.), *cert. denied*, 502 U.S. 879 (1991). Petitioner has not made the requisite showing and accordingly, the Court rejects his substantive due process claim.

The Ohio Court of Appeals summarized the evidence concerning the 1982 Florida conviction as follows:

> [T]he evidence demonstrates that appellant married a single woman with children, including Leslie, a nine-year-old daughter. Thus, appellant became the victim's stepfather. While the mother worked evenings, appellant would enter the girl's bedroom and perform cunnilingus on her while she was asleep. The first time this occurred was around Christmas of 1981. Sometimes appellant would also rub his penis against her vagina, inside the outer vaginal lips, and against her anus.... The one time she resisted his advances, by struggling and screaming, he tied her hands and feet to the bed with cloth and performed cunnilingus on her. She told her mother of the abuse in April of 1982, resulting in

> appellant pleading guilty to sexually abusing Leslie. He left the house, but returned six to eight months later. The mother was hospitalized soon afterwards, following a car accident. During that hospitalization, appellant began once again to engage in the same sexual activities with the daughter. After the mother discovered the continuing molestation, appellant was incarcerated for thirty months.

(Doc. 1, Ex. P58 at 10-11; Ex. P57 at 11).

The Ohio Court of Appeals summarized the evidence concerning the 1986 case, as follows:

> [A]ppellant performed cunnilingus on Jennifer, the twelve-year-old daughter of a single mother, as she slept while he baby-sat her during her mother's weekly evening shift at work. This began in June of 1986, when appellant first began dating Jennifer's mother. If Jennifer did not resist, he would not tie her up. If she did, he would. Appellant would also perform intercourse on the girl, holding her down by sitting on her

chest and arms. He told her no one would believe her if she disclosed the molestation.

On August 26, 1986, appellant, in contravention of Jennifer's mother's instructions, took Jennifer to his apartment. She testified that she was yelling and screaming, because she did not want to go. Upon arrival, she prepared for bed. When she was asleep, he began molesting her by touching her vagina. She tried to push him away. He picked her up, placed her on the bed, tied her up, and engaged in intercourse with her. Jennifer also testified to a subsequent event [occurring on September 7, 1986] where appellant bound her up with neckties, but was unable to continue, because her mother arrived, heard Jennifer screaming, and entered the room, attacking appellant. The mother testified she saw her daughter standing in a tee shirt and underwear, with two neckties hanging from her wrists and two others tied to the end of the bed.

Appellant began baby-sitting Jennifer at his own request because he did not want anyone raping or molesting her when her mother

> was not around. Jennifer's mother testified that she trusted appellant and that appellant, unlike some men she dated who did not accept her children, treated Jennifer "fantastically." He would take her special places and spend money on her. Jennifer's mother was glad there was a "man wanting to be involved with [her] family."

(Doc. 1, Ex P58 at 11-12; see Ex. P57 at 3-4).

The Ohio Court of Appeals described the evidence concerning the 1996 case, as follows:

> The victim of appellant's alleged criminal act ... ("Sarah") testified that she met appellant when she was eleven years old, shortly before the fall of 1988 when he began dating her mother. Because her mother is agoraphobic, any dating between appellant and Sarah's mother occurred in the mother's home. According to Sarah, one evening prior to Christmas of 1988, appellant came into her room while she was sleeping and performed cunnilingus on her, telling her not to tell anyone. She testified that in 1989, appellant would, more than monthly,

perform cunnilingus on her and insert his finger into her vagina. Sarah also described an incident which took place in the spring of 1989 in an Indianapolis, Indiana hotel room, where appellant pinned her arms when she fought his advances and put his penis inside her vagina. At other times when appellant molested her, Sarah would feign being asleep. Sarah also described two incidents of appellant attempting to coerce her to perform fellatio on him, one where she was able to refuse, and the other, which occurred after Christmas of 1988, where she was not. Sarah testified that the conduct by appellant embarrassed and frightened her, and that, sometime prior to spring of 1989, appellant threatened to kill her if she told anyone what was occurring.

Sarah's mother testified Sarah's contact with her biological father was infrequent; that appellant would spend the night in her home; that appellant developed a relationship with Sarah where he would pay attention to her and play with her; that he took her to Mt. Airy Forest and Indianapolis, Indiana; that the mother made the reservations for the

Indiana trip; that she masturbated appellant in front of Sarah, with his encouragement; and that, upon learning of the molestations of Sarah, she did not report appellant to the authorities.

Sarah testified that appellant molested her on both outings described above. She also testified that appellant was in her home dating her mother at least once a week; that he had given her gifts, sometimes before molesting her; that he gave her orders to carry out in the presence of her mother and that she would "listen" to what he told her; and that he instructed her regarding chores and homework. She also identified a Valentine's Day card she had sent appellant while he was incarcerated, as well as a letter in which she told him what she had been doing and about gifts she had received, and ended with the sentence "I love you." She testified that she sent the correspondence because she cared about him and because he had been nice to her, even while, at the same time he was molesting her. Appellant presented an alibi defense to Sarah's charges, alleging he was out of the country during the

> time some of the incidents with Sarah allegedly occurred.

(Doc. 1, Ex. P57 at 9-11; see P58 at 3-6). This Court finds that the Ohio court has accurately summarized the witnesses' testimony.

Evidence concerning petitioner's other crimes or acts is inadmissible to prove petitioner's character and to show that he acted in conformity with that character on the occasion of the crime charged or, said another way, to prove that he had the propensity to commit the crime charged. Ohio Evid. R. 404(B). Such conduct may, however, be admitted to demonstrate motive, opportunity, intent, preparation, scheme, plan, system, knowledge, identity, or absence of mistake or accident. *Id.*; Ohio Rev. Code § 2945.59. The other acts evidence must demonstrate these issues by "substantial proof," *State v. Jamison*, 552 N.E.2d 180 (Ohio 1990), and with respect to evidence of petitioner's other sexual acts, its prejudicial nature may not outweigh its probative value, Ohio Rev. Code § 2907.02(D). In Ohio, the trial court must also determine whether the evidence of the other acts is relevant to the crime in issue, i.e., whether the acts are close in time and similar in method or type. *State v. Snowden*, 359 N.E.2d 87 (Ohio 1976).

The Ohio Court of Appeals found that because all evidence involved petitioner becoming involved in a relationship with the victim's mothers and then, committing sexual acts of a similar nature against his victims, including frequent cunnilingus, over a period of time and generally while the girls appeared to be sleeping, the acts were "not so dissimilar in method or type" as to have no probative value. (Doc. 1, Exs. P57 at 12; P58 at 13). Although the acts involving Leslie occurred in 1981 and 1982, the acts involving Jennifer occurred in 1986 and the acts involving Sarah occurred in 1988 through 1990, the Ohio appellate court found them to be sufficiently close in time to be relevant because petitioner was incarcerated during much of the time between offenses. (*Id.*, Ex. P58 at 13-14; P57 at 12-13; *see* Ex. P52, Tr. 94-97).

With respect to the 1986 statutory rape involving Jennifer Cotton, and the statutory rape with force charges involving Sarah Adams occurring in 1988 through 1990, the Ohio Court of Appeals determined that the evidence concerning petitioner's other acts was admissible because it established the identity of the perpetrator by means of his *modus operandi* or "behavioral fingerprint." (*Id.*, Ex. P57 at 15-16). The characteristics of the other acts rather than petitioner's character determined that petitioner was the perpetrator. (*Id.*) The Ohio Court of Appeals found:

> The "other acts" evidence in this case demonstrates that appellant would become involved with a single mother of a prepubescent daughter. Appellant had sexual access to the daughters because their mothers were unavailable to protect them, either physically or psychologically. Appellant was the stepfather to one of the girls, was the "man around the house" in the other instance and provided instruction, presents, activities, and attention to the victim in this case. He became a trusted member or "friend" of the family. Shortly after becoming involved with her mother, appellant approached each girl as she lay sleeping and performed cunnilingus on her. His molestations would occur frequently and in the same manner. As long as she did not resist, the girl was not restrained. If she did resist, appellant would restrain her. Appellant penetrated the older girls' vaginas with his penis. He only rubbed his penis inside the outer vaginal walls of the

> younger girls. We hold, that although there were some differences in appellant's conduct toward the three victims, the similarity of methodology tends to show that the same person committed all three molestations ...

(Doc. 1, Ex. P58 at 16-17; see Ex. P57 at 15-16). The Court determined that the perpetrator's identity was at issue in the 1986 case because petitioner denied raping Jennifer despite the fact that she was pregnant. (Doc. 1, Ex. P57 at 14). The Court determined that the perpetrator's identity was at issue in the 1996 case because petitioner denied being the perpetrator and raised an alibi defense by attempting to show that he was not in the country during parts of 1988 and 1989. (*Id.*, Ex. P58 at 15).

With respect to the 1996 case involving forceful statutory rape of Sarah Adams, the Ohio appellate court also concluded that the other acts evidence was material to demonstrate petitioner's motive and intent to force the victim to submit to sexual acts. (Doc. 1, Ex. P58 at 17-18). The court concluded that:

> [T]he "other acts" evidence as to Leslie and Jennifer demonstrated appellant's motive to capitalize on the vulnerability of a young

> girl, by becoming a person of authority in her family and thus creating an environment in which he could use his dominance and control by virtue of his position in her family to compel the child to submit to sexual conduct.

(*Id.* at 18-19). Finally, the court found that the other acts were demonstrated by substantial proof, and that the probative value of the evidence was not outweighed by its prejudicial effect. (Doc. 1, Exs. P57 at 16-17, P58 at 19).

A state prisoner is not entitled to habeas corpus relief with respect to any claim that was adjudicated on the merits in the state court proceedings unless the adjudication of the claim resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d); *see also Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1044 (1998). A writ will issue only if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists. *See Brown v. O'Dea*, 187 F.3d 572, 577 (6th Cir. 1999). The application is not debatable "if it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible credible outcomes." *Nevers v. Killinger*, 169 F.3d 352, 357 (6th Cir.), *cert. denied*, 119 S. Ct. 2340 (1999).

A federal court may issue a writ of habeas corpus on the ground that petitioner's confinement violates the Constitution, laws or treaties of the United States, 28 U.S.C. § 2254(a), but not "on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41(1984). A state court ruling on the admission or exclusion of evidence is not open to challenge on federal habeas corpus review unless it rendered the trial so fundamentally unfair as to amount to a denial of due process. *Serra v. Michigan Dep't of Corrections*, 4F.3d 1348, 1354 (6th Cir. 1993), *cert. denied*, 510 U.S. 1201 (1994) (and cases cited therein); *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir.), *cert denied*, 464 U.S. 951, 962 (1983).

Petitioner argues that the Ohio Court's decision was both an unreasonable determination of the law and the facts because his identity, intent and motive were not in dispute in these proceedings, and in any event, the facts in the three cases are not sufficiently similar to show a *modus operandi*. This Court first concludes that the Ohio Court of Appeals reasonably determined that these issues were contested, and very convincingly lay out the distinctive similarities in petitioner's criminal conduct. Accordingly, petitioner has not persuaded this Court that the state court's decision to admit other acts evidence was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Since the Ohio Court of Appeals did not apply Federal law in analyzing petitioner's claim, this Court must independently ascertain whether introduction of prior bad acts evidence offended the Due Process Clause, rather than apply a "reasonableness" review. *See Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.), *cert. denied*, 119 5. Ct. 389 (1998). Petitioner fails to persuade this Court that the Due Process Clause requires that the issues of identity, intent or motive must be in dispute for the government to introduce other acts evidence. In support of his argument, petitioner cites to a circuit court decision that holds that the matter must be contested before other acts evidence may be admitted under Fed. R. Evid. 404(b). *See* Doc. 1, Memorandum at 85 citing *United States v. LeCompte*, 99 F.3d 274 (8th Cir. 1996). In *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1049 (1999), the United States Court of Appeals for the District of Columbia Circuit held that even when a defendant unequivocally stipulates to an element of an offense, Fed. R. Evid. 404(b) does not preclude the government from introducing evidence of other bad acts to prove that element. 141 F.3d at 1202. Six circuit courts, including the Sixth Circuit, have concluded that bad acts evidence may be admissible to prove an element of a crime regardless of whether the element is "in dispute." *See* 141 F.3d at 1211 and cases cited therein. Relying on *Old Chief v. United States*, 519 U.S. 172 (1997), the *Crowder* court explained its holding, as follows:

> The defendant in Old Chief claimed, as Crowder I held, that a defense stipulation to an element of a crime completely removes the element from trial, thereby rendering other evidence of the element irrelevant and thus inadmissible ... The Supreme Court rejected this argument. A defendant's offer to stipulate or concede an element of an offense, the Court concluded, does not

> deprive the government's evidence of relevance... There does not have to be an "actual issue" about the facts sought to be proven. As the Court put it, "evidentiary relevance under Rule 401 [is not] affected by the availability of alternative proofs of the element," such as a defendant's concession or offer to stipulate. ... In support, the Court quoted the statement in the advisory committee notes to Rule 401 that the "fact to which the evidence is directed need not be in dispute."

141 F.3d 1206. [citations omitted]. *Cf. United States v. Spence*, 125 F.3d 1192, 1194 n.2 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1544 (1998). A plea of not guilty to a criminal charge automatically places all issues related to the prosecution's burden of proof, including identity and intent, at issue. *See Newman v. Hopkins*, 6 F. Supp.2d 1111 at 1117 & n.3 (D. Neb. 1998) (citing *United States v. Miller*, 974 F.2d 953 (8th Cir. 1992) and *United States v. Gilmore*, 730 F.2d 550 (8th Cir. 1984)), *rev 'd on other grounds*, No. 98-2445, 1999 WL 767851 (8th Cir. Sept. 29, 1999). Accordingly, a state court's admission of evidence relevant to the perpetrator's identity, even when petitioner argues

that his identity was never at issue, does not offend the Due Process Clause warranting habeas corpus relief *Id.*; *cf. Old Chief,* 117 S. Ct. at 653.

As proof that the other acts evidence was used for an improper purpose, petitioner asserts that the prosecution in his closing argument referred to a chart of the other acts evidence and based his entire closing argument on the fact that this evidence "corroborated" the 1986 and 1996 charges. (Doc. 1, Memorandum at 54). Petitioner's characterization of the state's closing argument is wholly inaccurate. In fact, the prosecutor went to great lengths to put the jury on notice that other acts evidence was to be used for a limited purpose. For example, he stated:

> It's very important for you to understand that you can use that evidence in the appropriate way. You can't use it to just say he's a bad person, you know, and you might have an opinion about what he's like and what kind of a person he is. But you're going to have to leave that out and consider what the evidence is.
>
> And I urge you when you do to consider in the way that the Judge is going to instruct you is that you can use it for the

> purpose of deciding whether it proves the defendant's preparation, scheme, plan, system or motive or intent in doing the act. Scheme, plan system. All fight?
>
> Now, I can't emphasize to you enough that that is powerful and compelling evidence of guilt and it's something you absolutely can consider. And the Judge is going to tell you that there's a limited purpose for it, but you can use it to determine the guilt of this man to determine his system, his plan and his scheme.

(Doc. 1, P52, Tr. 818-819, 828). Accordingly, the prosecutor did not urge the jury to use the other acts evidence as propensity evidence. Moreover, the court did in fact provide the jury with a limiting instruction concerning the use of "other acts" evidence. (*Id.*, Tr. 869-870).

In conclusion, the admission of evidence concerning petitioner's other acts in this case to show petitioner's identity, intent and motive did not offend the Due Process Clause of the United States Constitution. *Cf. Breazeale v. Maass*, No. 94-35092, 1995 WL 41384 at **1 (9th Cir. Jan. 13, 1995), *cert. denied*, 516 U.S. 827 (1995); *Waters v.*

*Kassulke*, 916 F.2d 329, 336 (6th Cir. 1990); *Clark v. Ratelle*, No. 88-6644, 1990 WL 124856 at **3-4 (9th Cir. Aug. 28, 1990).

Assuming, *arguendo*, that the other acts evidence was admitted as propensity evidence, that would not necessarily render its admission a violation of due process. Fed. R. Evid. 413, which allows evidence of other sexual assault offenses in a sexual assault case, and Fed. R. Evid. 414 which allows evidence of other offenses of child molestation in a child molestation case both for the purpose of demonstrating propensity have been upheld as constitutional under the Due Process Clause. *United States v. Mound*, 149 F.3d 799, 800-801 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 842 (1999); *United States v. Castillo*, 140 F.3d 874, 879-883 (10th Cir. 1998); *United States v. Enjady*, 134 F.3d 1427, 1430-1433 (10th Cir.), *cert. denied*, 119 S. Ct. 202 (1998). The rationale for these new rules is that sex offenses often rely predominantly on credibility determinations of the defendant and victim and knowledge that the defendant previously committed rapes would assist in determining credibility. *See Enjady*, 134 F.3d at 1431. In the case of child sexual abuse, defendant's sexual interest in children has a high probative value. *See Mound*, 149 F.3d

801. Corroborating evidence is particularly helpful in the prosecution of child sexual offenders because of the secretive nature of the crime and the frequent lack of supporting evidence other than the child's testimony. *Castillo*, 140 F.3d at 883. Although the practice of excluding propensity evidence is "ancient," it is not embodied in the Constitution, and the United States Supreme Court has *not* held that admission of prior acts evidence to show propensity "would necessarily violate a defendant's right to a fair trial." *Enjady*, 134 F.3d at 1431.

As part of his first ground for relief, petitioner also argues that because the state trial court in a post-conviction proceeding determined that admission of evidence concerning the 1982 Florida conviction rendered his first trial of the 1986 offense fundamentally unfair, that determination is the "law of the case" and the 1982 conviction should not have been admitted upon retrial. (Doc. 1, Memorandum at 52).

"Under the doctrine of the law of the case, a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (citing *Christianson v. Colt Indus. Operating*

*Corp.*, 486 U.S. 800, 816(1988)); *see Nolan v. Nolan*, 462 N.E.2d 410 (Ohio 1984). The doctrine represents the general practice of the courts "to refuse to reopen what has been decided," but it is not a limit on the court's authority to revisit prior decisions. *Christianson*, 486 U.S. at 817; *see United States v. Palmer*, 122 F.3d 215, 220-221 (5th Cir. 1997); *United States v. Lacey*, No. 89-10054-01-SAC, 1994 WL 262725, at *6 (D. Kansas May 6, 1994). The "law of the case" does not apply when the evidence in a subsequent trial was substantially different; when there has been an intervening change in the law or when the decision was clearly erroneous and would work a substantial injustice. *Kori Corp v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985). The doctrine does not derive from federal constitutional law, and accordingly, petitioner's claim based on the law of the case is not cognizable in these proceedings.

To the extent that petitioner asserts that reconsideration of the issue of the admissibility of the 1982 conviction rendered the trial so fundamentally unfair as to amount to a denial of due process, this Court rejects petitioner's argument for these reasons: In the first trial mere reference was made to petitioner's 1982 convictions for auto theft and sexual abuse, and the prosecution invited the jury to use the evidence as it saw fit. (*See* Doc. 1, Ex. P16 at 8). In the second trial, the prosecution presented the testimony of the victim of the 1982 incident and her mother, as well as the testimony of the victim and her mother in the 1996 case, demonstrating petitioner's consistent pattern of behavior in committing these crimes or *modus operandi*. On retrial, the jury was informed by both the state and the trial judge that the evidence was to be used for a limited purpose. Accordingly, the evidence and circumstances in the subsequent trial were substantially different, warranting a different result regarding admissibility of the 1982 conviction.

As part of the first claim in his petition, petitioner also argues that the prosecution was estopped[2] from introducing evidence of his use of force against Jennifer Cotton on August 26, 1986 and all evidence relating to his conduct with Jennifer Cotton on September 7, 1986 because in his first trial he was acquitted of the force element of statutory rape and of the offenses of gross sexual imposition and attempted rape allegedly occurring on September 7, 1986. The Ohio Court of Appeals noted that this evidence was not used to demonstrate force or that petitioner had committed the crimes of which he had been acquitted, but instead was admitted to demonstrate petitioner's *modus operandi.* (Doc. 1, Ex. P57 at 23). Although petitioner presented this claim as a constitutional issue (Doc. 1, P53 at 32-33), the Ohio Court of Appeals applied an abuse of discretion standard, not Federal law. (Doc. 1, Ex. P57 at 23). This Court may, therefore, independently assess the merits of petitioner's claim.

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[2] Petitioner argues that this evidence was barred by principles of direct and collateral estoppel, citing *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992). For purposes of its analysis, this Court does not distinguish between these principles because the *Bailin* case indicates that the rules governing issue preclusion in criminal cases as established by the United States Supreme Court are the same. 977 F.2d at 280 n. 15.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Double Jeopardy Clause applicable to the states through the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794-96 (1969), protects a criminal defendant from repeated prosecutions for the same offense, *United States v. Dinitz*, 424 U.S. 600, 606 (1976), and from multiple punishments for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), overruled in part on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989). Collateral estoppel, which prohibits an issue of ultimate fact that has been determined by a valid and final judgment from being relitigated between the same parties, is embodied in the Fifth Amendment guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436 (1970).

"[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof" *Dowling v. United States*, 493 U.S. 342, 349 (1990); see *United States v. Felix*, 503 U.S. 378, 386-387 (1992). For example, admission of prior bad acts for which a defendant may have previously been acquitted can be admitted under Fed. R. Evid. 404(b) because the standard of proof is whether the jury can reasonably conclude that the acts occurred and that the defendant was the actor, a standard lower than the "beyond a reasonable doubt standard" required for conviction. *See Dowling*, 493 U.S. at 348 (citing *Huddleston v. United States*, 485 U.S.

681, 689 (1988)); *also see Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 899 (1999); *Jenkins v. Mauss*, No. 91-35742, 1993 WL 22212, at **2.3 (9th Cir. Jan. 29, 1993), *cert. denied*, 508 U.S. 965 (1993).

Since the standard of proof governing admission of other acts evidence in Ohio is by "substantial proof," a lower standard of proof than the "beyond a reasonable doubt" standard required for conviction, the admission of evidence of other acts of which petitioner had been previously acquitted did not violate the Fifth Amendment's prohibition on double jeopardy.

Accordingly, petitioner first ground for relief lacks merit.

### II. Petitioner's claim that the joinder of the 1986 and 1996 cases violated his right to due process, asserted in his second and third grounds for relief, lack merit.

As his second and third grounds for relief petitioner argues that the joinder of the 1986 and 1996 cases for trial offended the Due Process Clause.

Under Ohio law, two or more indictments may be tried together if the offenses are "of the same or similar character." Ohio. R. Crim. P.8, 13. To support severance of the charges, petitioner would have to show that his rights were prejudiced because evidence of the other charges would be inadmissible if the counts were severed or that the evidence of each crime is not simple and distinct. *See* Ohio R. Crim. P.14; *State v. Decker*, 624 N.E.2d 350 (Ohio Ct. App. 1993); *State v. Torres*, 421 N.E.2d 1288 (Ohio 1981).

In this case, the Ohio Court of Appeals determined that because the evidence of the 1986 and 1996 cases was cross-admissible and the evidence of each crime was simple and distinct, the trial court did not abuse its discretion in joining the charges against petitioner. (Doc. 1, Exs. P58 at 23-24, P57 at 21).

Joinder is a constitutionally valid balance between a defendant's fight to a fair trial and the state's interest in judicial economy. *Carter v. Cambra*, No. C 97-4005CRB, 1998 WL 556711, at *4 (N.D.Cal. August 31, 1998). Joinder is favored because it conserves time and expense, diminishes inconvenience to witnesses and minimizes the possibility of incongruous results in successive trials before different juries. *State v. Torres*, 421 N.E.2d 1288 (Ohio 1981).

While the state court decided the joinder issue as a matter of state law, this Court may only determine on habeas corpus review whether the state court's joinder of petitioner's offenses violated his federal constitutional rights. *Lucero v. Kerby*, 133 F.3d 1299, 1313 (10th Cir.), *cert. denied*, 118 S.Ct. 1684(1998); *Jackman v. Rees*, No. 85-5523, 1986 WL 17761, at **2 (6th Cir. Sept. 9, 1986), *cert. denied*, 480 U.S. 937 (1987); *Corbett v. Bordenkircher*, 615 F.2d 722, 724 (6th Cir.), *cert. denied*, 449 U.S. 853 (1980). "[M]isjoinder rises to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986).

In *Spencer v. Texas*, 385 U.S. 554 (1967), the United States Supreme Court upheld as constitutional Texas' practice of trying a defendant under a habitual offender statute at the same time that he was tried for an additional crime. *See Marshall v. Lonberger*, 459 U.S. 422, 437 n.6 (1983) (reaffirming *Spencer*). Recognizing that the prior convictions admitted for purposes of the recidivist statute may be prejudicial to a determination of the new crime, the Court stated:

> This type of prejudicial effect is acknowledged to inhere in criminal practice, but it is justified on the grounds that (1) the

> jury is expected to follow instructions in limiting this evidence to its proper function, and (2) the convenience of trying different crimes against the same person, and connected crimes against different defendants, in the same trial is a valid governmental interest.

385 U.S. at 562.

When offenses are joined, prejudice may result when: (1) the jury confuses and cumulates the evidence finding guilt when if the offenses were considered separately, it would not so find; (2) the defendant is hampered in presenting defenses because he desires to testify as to some crimes but not as to others; (3) the jury uses evidence of one crime to infer a criminal disposition on the part of defendant from which his guilt of the other crime is determined. *Lucero*, 133 F.3d at 1314; *Corbett*, 615 F.2d at 724-725 (citing *State v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976)).

"[S]everance is not required every time a defendant wishes to testify as to one charge but to remain silent on another. If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant." *United States v. Valentine*, 706 F.2d 282, 291 (10th Cir. 1983). To satisfy the court that his claim of prejudice is genuine, a defendant must make a convincing and detailed showing that he has "both important testimony to give concerning one count and strong need to refrain from testifying on the other." *Id.; see United States v. Alexander*, 135 F.3d 470, 477 (7th Cir.), *cert. denied*, 119 S. Ct. 136 (1998); *Closs v. Leapley*, 18 F.3d 574, 578 (8th Cir. 1994); *United States v. Lawrence*, No. 91-5707, 1992 WL 70190, at **45 (6th Cir. April 8, 1992); *Alvarez v. Wainwright*, 607 F.2d 683, 686 (5th Cir. 1979); *Pitts v. Redman*, 776 F. Supp. 907, 922 (D. Del. 1991), *aff'd*, 970 F.2d 899 (3rd Cir.), *cert. denied*, 506 U.S. 1003 (1992); *Holmes v. Scully*, 706 F. Supp. 195, 199 (E.D.N.Y. 1989).

In evaluating whether petitioner has been prejudiced to the extent that joinder violated his right to Due Process, courts examine the jury instructions provided, the statements of the prosecution with respect to the evidence of other acts, whether there is a great disparity in the amount of evidence underlying the joined offenses and whether the evidence with respect to each of the cases is sufficiently distinct. *Lucero*, 133 F.3d at 1314-1315; *United States v. Cook*, No.

93-10512, 1994 WL 461637, at **2-**3 (9th Cir. Aug. 25, 1994); *United States v. Lewis*, 787 F.2d 1318, 1322-1323 (9th Cir.), *amended by* 798 F.2d 1250 (9th Cir. 1986); *Carter*, 1998 WL 556711, at *5.

Petitioner argues that joinder was prejudicial for the following reasons: 1. the evidence from one case would not have been admissible if there were separate trials; 2. the evidence concerning one case would be used as propensity evidence with respect to the other case; 3. the evidence in the 1986 case was much weaker than the 1996 cases so the evidence in the 1996 case was used to corroborate the 1986 charge; 4. the crimes were similar causing jury confusion; and 5. petitioner's defense was compromised in the 1986 case because he wished to testify in that case but not in the 1996 case where he had an alibi and information concerning the psychological instability of the victim and her mother. (Doc. 1, Memorandum at 102-110, Exs. P54 at 24-32, P53 at 22-30, P34, P52 at tr. 32-37).

Petitioner's first reason is unpersuasive. This Court, based on the conclusion of the Ohio Court of Appeals, has determined that the evidence in the two cases was cross-admissible. (See Doc. 1, Ex. P57 at 5-17, P58 at 6-19).

Petitioner's second reason is not supported by the record. The trial court's instruction, which the jury is presumed to follow, admonished the jury that evidence of other crimes or acts is to be considered for the limited purpose of proving petitioner's "preparation, scheme, plan, system or motive or intent in doing the act in question." (Doc. 1, P52 at tr. 870). In addition, the court instructed the jury as follows:

> The charges set forth in each count in the indictments constitute separate and distinct matters. You must consider each count and the evidence applicable to each count separately and you must state your finding as to each count uninfluenced by your verdict as to any other count. The defendant may be found guilty or not of any one or all of the offenses charged.

(Doc. 1, P52 at ft. 871) [emphasis added]. The prosecution in his closing argument repeatedly and clearly stressed the limited purpose of other acts evidence as exemplified by the following passage:

> You can consider what he did to Leslie and what he did to Jennifer when you're determining his guilt in Sarah's case. And you can determine and you can consider what he did to Leslie and what he did to Sarah when you consider Jennifer's case. And both--they're all intertwined. And that's the importance of that evidence.
>
> Now, I can't emphasize to you enough that is powerful and compelling evidence of guilt and it's something you absolutely can consider. And the Judge is going to tell you that there's a limited purpose for it, but you can use it to determine the guilt of this man to determine his system, his plan and his scheme.

(Doc. 1, Ex. P52 at ft. 827-828). Accordingly, it appears that both the Ohio court and the prosecution steered the jury away from the improper use of the other acts evidence as propensity evidence.

With respect to petitioner's contention that the jury could confuse the facts of the cases because the crimes were so similar, this Court agrees with the conclusion of the Ohio Court of Appeals that "[i]n spite of the substantial similarities between the two cases, the factual situation of each was capable of segregation by the jury since the crimes charged involved different victims, primarily different witnesses, and sufficiently different factual scenarios." (Doc. 1, Ex. P57 at 21, P58 at 24).

Petitioner's contention that the evidence from the 1996 case was used to bolster the much weaker evidence from the 1986 case is unpersuasive. The Court does not perceive any significant disparity in the strength of the evidence in these two cases. Both cases involved essentially the testimony of the victims and their mothers and convictions depended primarily on whether the trier of fact believed them to be telling the truth.

In his brief to the Ohio Court of Appeals, petitioner presented his argument that he was deprived of testifying in the 1986 case because he did not desire to testify in the 1996 case with which it was joined, as follows:

> First, Appellant was unable to present the best possible defense in each case. Appellant could have testified in the 1986 case to attack the credibility of Jennifer Cotton, the alleged victim, because that should have been the ultimate issue of the case. The 1986 case boiled down to one person's word

against another's as there was no supporting medical evidence to show Appellant committed the offense of statutory rape. The testimony of Ruth and Jennifer is seriously questionable because in the 1987 jury trial Appellant was acquitted of gross sexual imposition, attempted rape and the element of force of the rape charge. On the other hand, Appellant invoked his constitutional right not to testify in the 1996 case because, as the case developed his best defense was that of alibi for the 1988 charges and attacking the credibility of the witnesses for the 1989 and 1990 charges because both Sarah Adams and Barbara Neal had been under long term psychiatric care. Further, the testimony of Sarah Adams was extremely vague and uncertain as to what, when or how the offenses allegedly occurred. Therefore, Appellant had important testimony to give in one cause while he chose to refrain from testifying in the other. Consolidation effectively denied and confounded defendant's rights to the best possible defenses and therefore it denies him a fair trial.

(Doc. 1, Ex. P54 at 28-29; P53 at 26-27). On its face, petitioner has alleged a reasonable concern. However, petitioner's analysis of the need for his testimony in one case and not the other is not borne out. As stated, both cases revolved around the credibility of the victims and their mothers, and therefore it was essential that the defense attack their credibility in both cases.

Moreover, petitioner has failed to provide this Court with any indication of what testimony he would have offered in the 1986 case. He has therefore not demonstrated how or that he could have attacked the credibility of the victim in the 1986 case by testifying. In addition, he has not shown how testifying in the 1996 case would have harmed him. *Cf. United States v. Dixon*, 184 F.3d 643, 646 (7th Cir. 1999). In other words, petitioner has not convinced this Court that there was in fact any greater reason for him to testify in the 1986 case than in the 1996 case, that he had important testimony to give in the 1986 case, or that he had a strong need to refrain from testifying in the 1996 case. He has therefore failed to establish that his claim of prejudice was genuine.

Accordingly, petitioner's claims, asserted as his second and third grounds for relief that the joinder of the

1986 and 1996 cases for trial deprived him of his right to due process lack merit.

### III. Petitioner's claim, asserted in ground four of the petition, that the state trial court's jury instructions were constitutionally defective lacks merit.

As his fourth ground for relief petitioner asserts that the jury instructions were constitutionally defective. The Ohio Court of Appeals upheld the challenged instructions as proper under state law. (Doc. 1, Ex. P58 at 24-27, P57 at 21-22).

To warrant habeas corpus relief, the challenged jury instructions must not only have been undesirable, or even "universally condemned," but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair in violation of due process. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)); *see also Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert denied*, 118 S.Ct. 1526 and 1547 (1998). The challenged instructions "may not be judged in artificial isolation," but rather must be considered in the context of the instructions as a whole and the trial record. *Estelle*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147).

The Due Process Clause of the Fourteenth Amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the offense charged. *In re Winship*, 397 U.S. 358, 364 (1970). A criminal defendant has a constitutional fight to have the jury, rather than the judge, find the existence of each element of a charged offense beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995) and cases cited therein; *Harmon v. Marshall,* 69 F.3d 963, 965 (9th Cir. 1995); *see Hoover v. Garfield Heights Mun. Court*, 802 F.2d 168, 175 (6th Cir. 1986) (citing *Glenn v. Dallman*, 686 F.2d 418 (6th Cir. 1982)), *cert denied*, 480 U.S. 949 (1987). Failure to instruct the jury on all elements of an offense is constitutional error, because it precludes the jury from finding each fact necessary to convict a defendant. *Id.*

In reviewing an ambiguous instruction, the court must inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a manner that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); *Esquibel v. Rice*, 13 F.3d 1430, 1433 (10th Cir.), *cert. denied*, 513 U.S. 951 (1994); *Fondren v. Lecureux*, No. 93-1914, 1994 WL 508254, at *5 (6th Cir.

Sept. 16, 1994), *cert. denied*, 513 U.S. 1164 (1995); *O'Neal v. Morris*, 3 F.3d 143, 145 (6th Cir. 1993), *vacated on other grounds*, 513 U.S. 432 (1995).

Petitioner first contends that the instructions caused the jury to use the other acts evidence as proof that the statutory rapes occurred. Petitioner's argument on this issue is convoluted. He contends that since the trial court instructed the jury that it could use the "other acts" evidence to show intent, and the only elements of statutory rape are that sexual conduct occurred and that the victim was under the age of 13, the "only use the jury could have made of the 'other acts' evidence was as 'proof' (corroboration), that the acts testified to occurred, or, to bolster the credibility of the alleged victims testimony as to the acts occurring." (Doc. 1, Memorandum at 113).

The trial court instructed the jury that the other acts evidence could be used "for the purpose of deciding whether it proves defendant's... intent." (Doc. 1, Ex. P52 at 870). As part of the instructions, the trial court read the verdict forms which indicated that the jury had to indicate whether petitioner "purposely compelled Sarah Adams to submit by force or threat of force." (Doc. 1, Ex. P52 at tr. 878). The trial court had earlier in the instructions indicated that purpose and intent were synonymous. (Doc. 1, Ex. P52 at tr. 877). Therefore the trial court's instruction that other acts evidence could be used for the purpose of demonstrating intent could reasonably be interpreted by the jury to mean the intent to force the victim to submit to petitioner. As the Ohio Court of Appeals determined, this was an appropriate use of the other acts evidence. (Doc. 1, Ex. P58 at 17-19).

The trial court also instructed the jury that purpose, which is synonymous with intent, is an element of the rape offense which must be proven. (*Id.* at tr. 876-877). As petitioner points out, this was clearly an error, since there is no intent requirement for statutory rape. Although the jury may have understood that it could use the other acts evidence for the purpose of proving intent to commit the rape offense, such an error was in petitioner's favor because it required the prosecution to prove an additional element of the offense.

With respect to each of the counts charged, the state trial court explained that the jury had to find that the defendant engaged in sexual conduct with the named victim who was not his spouse and who was less than 13 years of age. (Doc. 1, Ex. P52 at 871-875). It is most unlikely that the jury would have understood the other acts instruction together with the court's description of the actual elements of statutory rape as petitioner suggests, which is, to permit the jury to use the other acts evidence to prove that sexual conduct occurred. Since jurors are presumed to follow jury instructions, and the jurors were instructed to use other acts evidence to show intent, this Court presumes that they used it to show intent and did not use the other acts evidence to show that sexual conduct occurred. Although the court's instruction concerning "other acts" evidence was not crystal clear because the trial court failed to specify for what intent the evidence could be used, it is not reasonably likely that the jury interpreted the other acts instruction along with the court's other instructions to allow it to use the evidence as corroborative of the offenses or as supporting the victim's accounts, instead of for the purpose of showing intent, motive, scheme or the other purposes enumerated by the trial judge. Accordingly, the trial judge's "other acts" instruction, when read in the context of the instructions as a whole and the trial record, is not constitutionally defective.

Petitioner next finds fault with the trial court's instruction on force in the 1996 case. He contends that the instruction relieved the state of its burden of demonstrating that force was used by petitioner.

To impose life imprisonment, the state must show that the defendant purposely compelled the victim to submit by force or threat of force. Ohio Rev. Code § 2907.02(B). With respect to each of the statutory rape offenses involving Sarah Adams, the trial court instructed the jury to indicate in the verdict form whether petitioner "purposely compelled Sarah Adams to submit by force or threat of force." (*See* Doc. 1, Ex. P52 at tr. 878-880). The court also instructed the jury with respect to each of these charges that if they found the defendant guilty of rape than they must also determine whether petitioner "compelled Sarah Adams to submit by force or threat of force." (*Id.* at tr. 872-874). The trial court defined force as follows:

> Force means any violence, compulsion or constraint physically exerted by any means upon or against a person or thing. If you find that the relationship between the victim and the defendant is one of child or parental figure, the elements of force need not be openly displayed or physically brutal. It can be subtle and psychological.

> If you find beyond a reasonable doubt that under the circumstances in evidence the victim's will was overcome by fear or duress, the element of force has been proved. Threat includes direct threat and threat by innuendo, and veiled or indirect threat. The victim need not prove physical resistance to the defendant.

(Id. at tr. 876). The trial court also defined purpose as follows:

> Purpose is a decision of the mind to do an act with a conscious objective of engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means used and all the other facts and circumstances in evidence.

(*Id.* at tr. 877).

The Ohio Court of Appeals approved of the instruction pursuant to *State v. Eskridge*, 526 N.E.2d 304 (Ohio 1988) which allowed force to be "subtle and psychological" as opposed to "openly displayed or physically brutal," when the relationship of the victim and defendant is one of child to parental figure. The appellate court found, as follows:

> There was evidence here that appellant, prior to spring of 1989, threatened to kill Sarah if she told anyone what was occurring; that appellant developed a relationship with Sarah where he would pay attention to her and play with her; that Sarah was in his care at times when appellant molested her; that appellant was at Sarah's home at least once a week; that he would give her orders to carry out in the presence of her mother and that she would listen to what he told her; and that he instructed her regarding chores and homework and that Sarah observed her mother engaging in sexual acts with appellant at his encouragement. There was also evidence to demonstrate that appellant and Sarah were not equal in age, size, and strength. This evidence demonstrated sufficient authority of appellant

> over Sarah to invoke the *Eskridge* instruction.

(Doc. 1, Ex. P58 at 26-27).

Petitioner apparently argues that the *Eskridge* instruction removed the "purposely compelled" element offorce. (Doc. 1, Memorandum at 115-116). The fact that force may be exerted in a subtle and psychological manner, however, does not negate the requirement that petitioner must "purposely compel" his victim to submit by force. Considering all the trial court's jury instructions concerning force and the verdict forms submitted to the jury, it is not reasonably likely that the jury failed to understand that the state had to prove that petitioner purposely compelled his victim to submit to him by force or threat of force in order to convict him of forceful statutory rape.

Petitioner's final alleged defect in the jury instructions concerns the 1986 case. Petitioner objects to the state judges' instruction to the jury, in response to a jury question, that it was sufficient for them to determine that the crime took place "on or about" August 26, 1986, as opposed to precisely on that date. (*See* Doc. 1, Ex. P52 at tr. 890-892).

Where a particular date is not a substantive element of the crime, Due Process does not require the prosecution to prove that the crime occurred on a precise date. *United States v. Morris*, 700 F.2d 427, 429 (1st Cir.), *cert. denied*, 461 U.S. 947 (1983); *cf. United States v. Leibowitz*, 857 F.2d 373, 378 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989). Moreover, when the indictment alleges that an offense occurred "on or about" a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date. *Leibowitz*, 857 F.2d at 379. In this case, petitioner had notice that the offense occurred "on or about" the August 26, 1986 date from the indictment. (*See* Doc. 1, Ex. P2). Moreover, the date of the offense was not an element of the crime.

The Ohio Court of Appeals concluded that because there was no alibi defense presented, the "on or about" instruction did not prejudice petitioner's ability to fairly defend himself (Doc. 1, Ex. P57 at 22). This Court agrees. In his defense, petitioner did not challenge the accuracy of the date, but rather attempted to discredit the victim's testimony concerning the offense, primarily by pointing out inconsistencies with her testimony in the first trial. (Doc. 1, Ex. P52 at 420-452). Since his defense did not focus on the exact date of the offense, petitioner's ability to present a defense was not compromised by the "on or about" instruction. Accordingly, petitioner has not shown that the "on or about" jury instruction rendered his trial fundamentally unfair.

In conclusion, petitioner's claim that the jury instructions in his trial were constitutionally defective, asserted as his fourth ground for relief lacks merit.

### IV. Petitioner's claim that the denial of his request to file a pro se supplemental brief on appeal amounted to a constitutional violation, asserted in ground five of the petition, lacks merit.

As his fifth ground for relief, petitioner asserts that the state appellate court denied his request to file a pro se supplemental brief in violation of the United States Constitution.

Petitioner filed his notice of appeal from the judgment of conviction on June 24, 1996. (Doc. 1, Ex. P51). Through counsel, petitioner filed briefs in the Ohio Court of Appeals on December 2, 1996, followed by reply briefs on February 18, 1997. (Doc. 1, Exs. P53, P54, P55, P56). On February 5, 1997, petitioner filed a motion for leave to file a pro se supplemental brief (Doc. 1, Ex. P65). He indicated that he did not want to discharge appellate counsel, but he would if that was the only way that the state court would consider the claims raised in his supplemental pro se brief. (*Id.* at 2). On February 25, 1997, the Ohio Court of Appeals summarily denied his request to file a supplemental pro se brief and his request to discharge counsel. (Doc. 1, Ex. P69).

Although a criminal defendant has a right to waive counsel and represent himself at trial, a right derived from the Sixth Amendment, *see Faretta v. California*, 422 U.S. 806 (1975), the extent of a defendant's right to represent himself on appeal is an unsettled issue.[3] The United States

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[3] In his petition, petitioner suggests that the denial of the right to self-representation on appeal violates his rights under the Equal Protection Clause and Due Process Clause of the Constitution. Although the right to counsel on the first appeal as of right derives, in part, from the Equal Protection Clause and the Due Process Clause, these constitutional sources do not provide a basis for finding a correlative right of self- representation on direct appeal. *Lumbart v. Finley*, 735 F.2d 239, 246 (7th Cir. 1984); *see Dickinson v. Upchurch*, No. 88-2803, 1989 WL 37293, at **1 (9th Cir. April 10, 1989).

Supreme Court stated that "a prisoner had no absolute right to argue his own appeal or even to be present at the proceeding in an appellate court." *Price v. Johnston*, 334 U.S. 266, 285 (1948), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991). The Court noted that "[o]ral argument on appeal is not an essential ingredient of due process." *Id.* at 286. The Fourth and Seventh Circuits have held that, unlike the trial stage, there is no constitutional right of any kind to self-representation on appeal. *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985); *Lumbert v. Finley*, 735 F.2d 239, 245 (7th Cir. 1984). Based on the premise that "a defendant is not required to have counsel forced upon him or her," the Eighth and Fifth Circuits have held that a defendant has a constitutional right to file a pro se brief on appeal. *Chamberlain v. Ericksen*, 744 F.2d 628, 630 (8th Cir. 1984), *cert denied*, 470 U.S. 1008 (1985); *see Myers v. Collins*, 8 F.3d 249, 25 1-252 (5th Cir. 1993).

Noting that the right to self-representation on appeal is not absolute, the Fifth Circuit has specifically excluded *supplemental* pro se briefs and belated requests to proceed pro se from this constitutional protection. *See United States v. Wagner*, 158 F.3d 901 (5th Cir. 1998); *Dyer v. Johnson*, 108 F.3d 607 (5th Cir. 1997); *Myers v. Johnson*, 76 F.3d 1330, 1334-1335 (5th Cir. 1996); *Smith v. Collins*, 977 F.2d 951, 962 (5th Cir.), *cert. denied*, 510 U.S. 829 (1993); *cf. Howie v. Borg*, No. 92-16738, 1993 WL 191896, at **2 (9th Cir. 1993); *Dickinson v. Upchurch*, No. 88-2803, 1989 WL 37293, at **1 (9th Cir. April 10, 1989). Applying the reasoning of *McKaskle v. Wiggins*, 465 U.S. 168 (1984), a decision which addressed the right of self-representation at trial, to the appellate situation, the Myers court explained this limitation, as follows:

> [W]e hold that a criminal defendant who clearly and unequivocally asserts his right to present pro se briefs on the first direct appeal must be allowed to "preserve actual control over the case he chooses to present" to the appellate court--i.e., he must be allowed to determine the content of his appellate brief. If standby counsel substantially interferes with a pro se appellant's presentation of his appeal--for example, by denying him access to the transcript--the right to present pro se briefs on direct appeal will be effectively denied. Of course, a criminal appellant may abandon the right to present pro se briefs on direct

> appeal, once asserted, by inviting or agreeing to standby counsel's substantial participation in preparation of the brief Additionally, there is no constitutional right to hybrid representation. Thus, when a criminal appellant accepts the assistance of counsel, but later objects to his attorney's appeal strategy or preparation of the brief, the criminal appellant cannot then expect to be allowed to file a supplemental pro se brief. By accepting the assistance of counsel the criminal appellant waives his right to present pro se briefs on direct appeal.

76 F.3d at 1335. [citations omitted]. Allowing defendant to assert his right to self-representation in an untimely manner would "obstruct the orderly administration of justice and compromise the integrity of the appellate process." *Dyer*, 108 F.3d 608- 609; *see Wagner*, 158 F.3d at 902-903. A defendant, who initially agrees to legal representation, waives his right to present pro se briefs on appeal, despite his belated desire to discharge his attorney to avoid hybrid representation. *Dyer*, 108 F.3d 608-609.

In this case, petitioner filed his motion for leave to file a supplemental pro se brief seven months after his notice of appeal and two months after his counsel filed a brief in his behalf. Assuming, *arguendo*, that petitioner does have a constitutional right to represent himself on appeal, petitioner invoked that right too late. Petitioner had already accepted assistance of counsel for the preparation of his appeal and had, therefore, waived his right to present pro se briefs on appeal. Accordingly, petitioner's claim, asserted as his fifth ground for relief that the state appellate court's denial of his right to file a pro se supplemental brief violated his constitutional rights is without merit.

As part of his fifth ground for relief petitioner also asserts that the state appellate court violated his constitutional rights by denying his request to supplement the appellate record with materials from his first trial of the charges involving Jennifer Cotton, and all pretrial materials from the cases involved here. Petitioner represented that he needed these materials to support the claims raised in his supplemental pro se brief (*See* Doc. 1, Ex. P66). Since petitioner did not have a constitutional right to file a pro se supplemental brief he also did have a constitutional right to file materials in support of that brief (*See* Doc. 1, Ex. P69). Accordingly, the appellate court's ruling striking his motion to complete the record on appeal does not offend the Constitution.

### V. Petitioner's claims of prosecutorial and judicial misconduct, asserted in his sixth ground for relief, lack merit.

As his sixth ground for relief petitioner asserts that the prosecutor acted improperly by introducing evidence of petitioner's prior bad acts and that the judge was biased because he allowed the introduction of such evidence.

The Due Process Clause establishes a "constitutional floor" and not a "uniform standard" with respect to a judicial bias claim. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (citing *Aetna Life Ins. Co. v. Lavoje*, 475 U.S. 813, 828 (1986)). The Due Process Clause requires "a fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35 (1975), "before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 905 (citing *Aetna Life Ins. Co.*, 475 U.S. 821-822 and *Turney v. Ohio*, 273 U.S. 510, 523 (1927)).

The scope of federal habeas corpus review of prosecutorial misconduct claims is narrow. On habeas corpus review of a state conviction, the federal court does not sit as an appellate court with supervisory power to rectify general trial errors. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). Where no specific constitutional fight is alleged to have been infringed by the prosecutor's conduct, a claim of prosecutorial misconduct is one of ordinary trial error, which does not rise to the level of a constitutional violation unless the misconduct "so infected the trial with unfairness as to render the resulting conviction a denial of due process." *Id.*, at 642-43; *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

Although the prosecutor adduced evidence of petitioner's prior bad acts and the trial court allowed its introduction, this was legally proper. *See* sections I and II supra. Accordingly, the prosecutor's and trial court's actions do not amount to misconduct. This Court has carefully reviewed the record in this case and concludes that petitioner's claims of judicial bias and prosecutorial misconduct are baseless.

## V. Petitioner's Pending Motions (Docs. 19-21, 24-26, 30-31).

Petitioner has filed several motions with this Court requesting discovery, an evidentiary hearing and expansion of the record. (Docs. 19-21, 24-26, 30-31). Petitioner is attempting to bolster his alibi defense in the 1996 case by introducing new evidence into this record showing that he was in Mexico during 1988 and 1989 when the sexual offenses against Sarah Adams took place. Petitioner asserts that such evidence demonstrates that he is "actually innocent" of the crimes of which he was convicted. He argues that evidence of his actual innocence is relevant for two reasons. First, he asserts that the new evidence warrants his release from prison. Second, he explains that evidence of his actual innocence allows this Court to consider claims which otherwise would be waived due to procedural defaults he committed in the state court.

In *Herrera v. Collins*, 506 U.S. 390 (1993), the United States Supreme Court clarified the role of actual innocence claims in habeas corpus proceedings:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.

506 U.S. at 400. The Court explained the basis for the rule:

> The rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution--not to correct errors of fact.

*Id.* The Court emphasized that "[f]ederal courts are not forums in which to relitigate state trials." *Id.* at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Although a claim of "actual innocence" does not itself provide the basis for habeas corpus relief, it is "a gateway through which a habeas petitioner must pass" to have the federal court consider constitutional claims otherwise barred by defenses of abusive or successive use of the writ or waiver defenses based on procedural defaults in the state courts. *Id.* at 404; *Sawyer v. Whitley*, 505 U.S. 333 (1992); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court noted that "the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Herrera*, 506 U.S. at 417.

The Supreme Court "left the door open a tiny crack," *Stafford v. Saffle*, 34 F.3d 1557, 1561 (10th Cir.

1994), *cert. denied,* 514 U.S. 1099 (1995), for the adjudication of freestanding actual innocence claims in dicta, as follows:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

*Herrera*, 506 U.S. at 417.

### A. Motions related to Expansion of the Record (Docs. 19, 20, 24, 31).

Petitioner moved to expand the record in this case to include the affidavit of Yvonne Zeltner-Muller who stated that he was abroad in parts of 1988 and 1989, the years that the sexual offenses against Sarah Adams took place. (Doc. 5). He also requested that exhibits and physical evidence from the state trial be made part of the record in this case. (Doc. 5). The Magistrate Judge denied petitioner's motion (Doc. 18), and petitioner now objects to that ruling. (Doc. 20). Petitioner further requests that affidavits from two other persons, and related materials, also indicating his absence from this country during that period, be included in the record. (Doc. 19, 31). Finally, he wishes to expand the record with original photographs that were attached to the affidavit of Yvonne Zeltner-Muller and with the state's reply briefs before the Ohio Supreme Court. (Doc. 24).

Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition."

Petitioner maintains that the affidavits and related materials support his alibi defense in the 1996 case, demonstrating his "actual innocence."[4] He asserts that such evidence is relevant in this case because it supports habeas corpus relief and because it would require this Court to consider any claims which are otherwise waived due to procedural defaults committed in the state court. This Court, however, has already decided all the claims petitioner raised in his petition on the merits. The Court has not found that any of petitioner's grounds for relief were waived because petitioner committed a procedural default in state court. Accordingly, it is not necessary for petitioner to demonstrate his actual innocence for this Court to consider his claims on the merits.

Moreover, petitioner has not alleged actual innocence as an independent claim for relief in his petition. Assuming, *arguendo*, that he had, under *Herrera*, such a claim would not be cognizable in a habeas corpus proceeding absent other constitutional violations. Petitioner has already had an extensive trial in the state court, and this Court's task on a petition for a writ of habeas corpus is to determine whether that trial was fair under the standards established by the United States Constitution, not to retry petitioner. The Court has determined that there were no constitutional violations in petitioner's trial.

---

[4] Petitioner further argues that some of the trial exhibits, such as his passport and telephone records, and the new affidavits are relevant to a determination of whether he was prejudiced by joinder of the 1996 and 1986 cases. (Doc. 20). He implies that because they demonstrate his innocence, they must also establish that he was prejudiced by the joinder of the cases. (*Id.; see* Doc. 23 at 5). This does not follow. A showing of prejudice does not depend on the innocence or guilt of the individual defendant, but instead focuses on the fairness of the proceeding.

Under the most liberal reading of *Herrera*, a federal court on habeas corpus review may consider newly discovered evidence of actual innocence in a capital case where there is no state avenue open for relief 506 U.S. at 417. This is not, however, a capital case and petitioner yet has the state avenue of a motion for a new trial based on newly discovered evidence, *see* Ohio R. Crim. P.33, or alternatively, clemency, see Ohio Const., Art. III, § 11, available for the consideration of his actual innocence claim. *Cf. Taylor v. Hannigan*, No. 93-3147, 1998 WL 239640, at *21 (D. Kansas Feb. 4,1998), *appeal dismissed,* No. 98-3071, 1999 WL 44248 (10th Cir. Feb. 1, 1999), *cert. denied*, 120 S. Ct. 219 (1999).

Petitioner had also requested the inclusion into this record of many of the trial exhibits, including his passport, a chart used by the prosecution during closing, petitioner's mother's telephone records, as well as exhibits from the 1987 trial. (*See* Doc. 20). Petitioner has not persuaded this Court that reviewing these items would be helpful in the adjudication of petitioner's claims. These items are all amply described in the transcript and other documents already in this record, and petitioner has failed to demonstrate that having the actual items in hand would aide the Court's decision.

Accordingly, petitioner's motions to supplement his motion to expand the record (Docs. 19, 31) are hereby DENIED. Petitioner's objections to the Magistrate Judge's Order denying expansion of the record are OVERRULED (Doc. 20) and the Magistrate Judge's Order is AFFIRMED because the order is not clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a). Petitioner's "motion to submit original photographs attached to affidavit of Yvonne Zeltner-Muller" (Doc. 24) is DENIED. Petitioner's motion to expand the record to include the state's reply memoranda filed in the Ohio Supreme Court (Doc. 24) is GRANTED.

**B. Motions related to Discovery (Docs. 25, 26).**

Petitioner moves for leave to depose Angela Erwin or direct interrogatories to her for the purpose of demonstrating that he was in Mexico in 1988, and therefore innocent of the offenses against Sarah Adams. (Docs. 25, 26).

A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). He may engage in discovery only upon a showing of "good cause." *Id.; see* Rule 6, Rules Governing § 2254 Cases in the United States District Courts. "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is... entitled to relief" then discovery is permitted. *Bracy*, 520 U.S. at 908-909 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

Petitioner alleges that Ms. Erwin will substantiate his allegation that he was abroad in November or December, 1988. (Does. 25, 26). Since this Court has considered all of petitioner's grounds for relief on the merits, and has not found that petitioner committed a procedural default in presenting his claims to the state courts, a showing of actual innocence based on alibi evidence is not necessary in order to permit this Court to consider petitioner's claims on the merits. Moreover, petitioner would not be entitled to relief based on an independent claim of actual innocence in the absence of a constitutional violation, and this Court has determined that there were none. Accordingly, petitioner's motion to take the deposition of Angel Erwin or direct interrogatories to her and petitioner's motion to supplement that motion (Docs. 25,26) are DENIED.

### C. Motions related to an Evidentiary Hearing (Docs. 21, 30).

Petitioner moves for an evidentiary hearing to present the testimony of witnesses and introduce documentary evidence which will place him in Mexico during 1988 and 1989. (Docs. 21, 30). He claims that this evidence will bolster his alibi defense in the 1996 case and thereby demonstrate his actual innocence. (*Id.*). He also seeks to present the testimony of his defense counsel at trial, Tom Miller, and the state's counsel on appeal, William Breyer, who allegedly informed the trial court that his pretrial rulings were "fundamentally unfair." (Doc. 21). Petitioner argues that the testimony of these attorneys is relevant to his claim of judicial and prosecutorial misconduct, asserted in his sixth ground for relief (*Id.*).

As a general rule, a federal court must hold an evidentiary hearing on habeas corpus review when there are material facts in dispute, when petitioner did not receive a fill and fair evidentiary hearing in state court which resulted in a finding by the state court on the relevant facts, and when petitioner alleges facts which, if proved, entitle him to relief. *See Townsend v. Sam*, 372 U.S. 293, 312 (1963), *overruled in part by Keeney v. Tamayo-Reeves*, 504 U.S. 1 (1992); *Cardwell v. Greene*, 152 F.3d 331, 336-337 (4th Cir.), *cert. denied*, 119 S. Ct. 587 (1998); *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992). Under *Townsend*, an evidentiary hearing is required if: 1) the merits of the dispute were not resolved at the state hearing, 2) the state determination is not fairly supported by the record, 3) the factfinding procedure was inadequate, 4) there is a substantial allegation of newly discovered evidence bearing on the constitutionality of petitioner's detention, 5) the material facts were not adequately developed or 6) for any reason, the state court failed to afford petitioner a full and fair hearing. *Townsend*, 372 U.S. at 3 12-317; *see Cardwell*, 152 F.3d at 336-337. The district court retains the discretion to hold a hearing when one is not mandatory, except in those instances specifically precluded by statute. *See Townsend*, 372 U.S. at 318.

The Antiterrorism and Effective Death Penalty Act (AEDPA) precludes the holding of an evidentiary hearing when petitioner fails to develop the factual basis of the claim in the state court proceedings, unless petitioner shows: (1) that the claim relies on either a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence; and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty ofthe underlying offense. 28 U.S.C.A. § 2254(e)(2). Where a habeas petitioner has diligently sought to develop the factual basis underlying his claim, but a state court has prevented him from doing so, a hearing is not precluded. *See Miller v. Champion*, 161 F.3d 1249, 1252 (10th Cir. 1998) and cases cited therein.

Assuming, arguendo, petitioner could overcome the hurdle posed by section 2254 (e)(2), petitioner's evidence supporting his alibi defense would not entitle him to relief in these proceedings because this Court has considered all of petitioner's grounds for relief on the merits and has found no constitutional violations in the state court record. This is, therefore, not a case in which a showing of actual innocence is necessary to overcome procedural defaults in the state court and enable the Federal court to reach the merits of petitioner's claims. To the extent that petitioner asserts an independent claim of actual innocence, Federal courts upon habeas corpus review do not have the power to assess such claims in the absence of constitutional violations, especially in non-capital cases where alternative state remedies are available. *See White v. Keane*, 51 F. Supp.2d 495, 504 (S.D.N.Y. 1999). Moreover, even if this were a capital case with no state remedy, the evidence proffered by petitioner does not amount to the "truly persuasive demonstration of innocence" envisioned by the *Herrera* Court as arguably rendering an execution unconstitutional. *See Herrera*, 506 U.S. at 417. This Court has determined that, at most, the evidence petitioner proffers would corroborate his alibi theory. It is, however, far from persuasive proof of petitioner's innocence.

Petitioner also requests an evidentiary hearing for the purpose of introducing evidence regarding his sixth ground for relief. In adjudicating a claim of prosecutorial misconduct or judicial bias, this Court does not seek the opinion of state trial or appellate counsel on this issue, but instead examines the record and applies the law. Therefore, the alleged opinions of petitioner's trial counsel and of the state's appellate counsel that the rulings of the trial court and the positions taken by the prosecution rendered the trial fundamentally unfair would not entitle petitioner to relief (*See* Doc. 21 at 4).

Accordingly, petitioner's motion for an evidentiary hearing and motion to supplement his motion for an evidentiary hearing (Docs. 21, 30) are DENIED.

**IT IS THEREFORE ORDERED THAT:**

1. Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be DENIED.

2. Petitioner's motions pertaining to expansion of the record, discovery and an evidentiary hearing (Docs. 19, 21, 24, 25, 26, 30, 31) are DENIED with the exception of petitioner's motion to expand the record to include the state's reply memoranda filed in the Ohio Supreme Court (Doc. 24) which is GRANTED. Petitioner's objections to the Magistrate Judge's Order denying expansion of the

record are OVERRULED (Doc. 20) and the Magistrate Judge's Order (Doc. 18) is AFFIRMED.

3. A certificate of appealability will not issue because for the foregoing reasons, petitioner has failed to make a substantial showing of the denial of a constitutional right remediable in this federal habeas corpus proceeding. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

4. With respect to any application by petitioner for *in forma pauperis* status for the purposes of pursuing his appeal of this order, this Court certifies that pursuant to 28 U.S.C. § 1915 (a) an appeal of this order would be taken in "good faith." See Fed. R. App. P. 24(a); *Kincade v. Sparkman*, 117 F.3d 949, 952 (6th Cir. 1997).

Date: 2/8/00

/s/ Herman J. Weber
Herman J. Weber, Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**JAMES FRANKLIN LOVE**
***Plaintiff(s),***

**C-1-98-777**

**v.**

**STEPHEN J. HUFFMAN**
***Defendant(s).***

## JUDGEMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Petitioner's petition for writ of habeas corpus (doc. 1) is DENIED. Petitioner's motions pertaining to expansion of the record, discover and an evidentiary hearing (docs. 19,21,24,25,26,30,31) are DENIED with the exception of motion to expand the record to include the state's memoranda filed in the Ohio Supreme Court (doc. 24) which is GRANTED. Petitioner's objections to the Magistrate's Order (doc. 18) is AFFIRMED.

A certificate of appealability will not issue and an appeal of this order would not be taken in good faith therefore the Court denies leave to appeal in forma pauperis.

February 9, 2000

Kenneth Murphy, Clerk
/s/________________
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

**JAMES F. LOVE,**
*Petitioner,*

**CASE NO. C-1-98-777**
**(Judge Herman Weber)**

**vs.**

**HAROLD CARTER, Warden,**
*Defendant.*

00 JAN 28 PM 1:10

## SUPPLEMENTAL MOTION TO EXPAND THE RECORD

Now comes the Petitioner, James F. Love, by and through counsel, and hereby moves this Honorable Court to allow him to supplement the Motion to Expand the Record filed on November 21, 1998 with the Affidavit of Ms. Cairinne Thompson.

## MEMORANDUM IN SUPPORT

The attached affidavit of Ms. Thompson is submitted to the Court pursuant to Rule 7 (a) of the Rules governing a §2254 case. This affidavit is additional evidence in support of actual innocence which appears in the trial record. The affidavit is submitted to further support the "clear and convincing" evidence that Petitioner, James F. Love, is actually innocent of the 1988 and 1989 charges. The affidavit assists in demonstrating this as an extraordinary case in which a "manifest miscarriage of justice has occurred" in reference of Respondent's claim of state procedural defaults and waivers.

This affidavit corroborates the evidence already submitted by way of passport, telephone records, photographs and Ms. Yvonne Zeltner-Muller's affidavit. Petitioner was in Zihuatanejo, Mexico at the time he is alleged to be in Ohio committing the crimes charged against him.

Ms. Thompson's affidavit solidifies the evidence establishing Petitioner was in another country at the time Ms. Neal and her daughter claim Petitioner met them. The affidavit highlights the lie told by Sarah Adams that she was the victim of a sexual act "the week after Christmas of 1988." (Ex. p. 52, pgs. 710-711.)

Ms. Thompson's affidavit supports the evidence of Cincinnati Bell records which contain a phone call from Zihuatanejo, Mexico on December 1, 1988 (Trial transcript pgs. 771-773) (originally Petitioner believed the first phone call from Mexico occurred a week later in December, 1988.)

Exhaustion and presentation of the affidavit are not required because it is submitted in defense of claimed state procedural bars. *Schlup v. Delo*, 513 U.S. 298 (1995); *Lunchar v. Thomas*, 517 U.S. 314, 326 (1996).

Exceptional circumstances in this case which warrant expansion of the record to include the attached affidavit. Petitioner was indicted in 1996 for acts alleged to have occurred "sometime in 1988", "sometime in 1989" and "sometime in 1990." The difficulty in establishing one's whereabouts some eight years later is self-evident. To located foreign citizens who have moved, divorced and had no reason to be aware of the indictment in Ohio is an enormous undertaking.

Ms. Thompson's affidavit further meets Petitioner's obligation to support his allegation of actual innocence with "reliable new evidence" outside the record of the trial. *Schlup*, supra, at 316-317, 326-327.

Ms. Thompson's affidavit appears to have a typographical error at paragraph 4. In the second sentence, Ms. Thompson states the year was "1989." However, reading the entire affidavit, it is apparent the year is 1988.

The record should be expanded with the affidavit attached supplementing the motions to expand the record filed on April 23, 1999 and November 21, 1998.

WHEREFORE, Petitioner respectfully requests that the record be expanded further to include the attached affidavit.

Respectfully submitted,
/s/ William R. Gallagher
WILLIAM R. GALLAGHER (0064683)
Attorney for Appellant
The Citadel
114 East Eighth Street
Cincinnati, Ohio 45202
(513) 651-5666

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. Mail to M. Scott Criss, Assistant Attorney General, Corrections Litigation Division, 140 E. Town Street, 14th Floor, Columbus, Ohio 43215 this 10 day of October, 2000.

/s/ William R. Gallagher
WILLIAM R. GALLAGHER (0064683)

**CANADA )**
**PROVINCE OF ) IN THE MATTER OF**
**BRITISH COLUMBIA ) JAMES LOVE**

TO WIT:

I, Cairinne Thompson of 356 East 18th Street, North Vancouver, British Columbia SOLEMLY DECLARE, THAT:

1. I am a retired school teacher and am 65 years of age. I am a Canadian citizen.

2. I was an acquaintance of James Love in Zihuatanejo, Mexico during 1988 and 1989 and as such have personal knowledge of the facts and the matter herein deposed to save and except where stated to be based upon information belief in which case I verily believe them to be true.

3. That in approximately September 1988 I traveled to Zihuatanejo, Mexico with my former husband Rex Jordan.

4. My former husband and I vacationed during the winter months in Zihuatanejo, Mexico. Some time in the fall of 1989 I met James Love on La Ropa beach in Zihuatanejo, Mexico.

5. James Love and I would see one another every two to three days because we frequented the same beach. James

Love also resided at that beach in an apartment behind a restaurant.

6. In 1989, I introduced James Love to Yvonne Muller a woman who was also staying in Zihuatanejo, Mexico.

7. I recall my former husband and I left Zihuatanejo, Mexico sometime in May 1989 and that when we left James Love was still there.

AND I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

DECLARED before me at )
North Vancouver in the )
Province of British Columbia )
this 7th day of January 2000 )
/s/ Tanya Chamberlain )
A Notary Pubic in and for )
the Province of British )
Columbia. A Commissioner )
for taking affidavits for )
British Columbia )

/s/ Cairinne Thompson

TANYA CHAMBERLAIN
DONALDSON JETTÉ
Barristers
400-1090 HOMER STREET
VANCOUVER, B.C. V6B 2W9
TEL: 681-8222
FAX: 681-1331

state what that line says?

A. December 1, there was a call from, and the word is kind of hard for me to pronounce, Zihuatanejo, Mexico.

Q. Okay

A. I'm not sure of the pronunciation.

Q. All right.

A. It came from that number.

Q. Okay. From that number?

A. Yes.

Q. Okay. Could that be Zihuatanejo, Mexico?

A. Sounds right.

Q. Okay. And that was a call from Zihuatanejo perhaps?

A. That's correct.

Q. Okay. Next I would ask you to take a look at I believe it would be Defense Exhibit Number 12. May I see that? Okay. I would ask you to turn to page 4 of that exhibit.

A. Okay

Q. Okay. And this lower part of this poster here I would ask you, does this look like a fair and accurate depiction of page 4 of Defense Exhibit 12?

A. Yes, it

## IN THE UNITED STATES DISTRICT COURT
## FOR THE SOUTHERN DISTRICT OF OHIO
## WESTERN DIVISION

**JAMES F. LOVE,**
*Petitioner,*

vs.

**STEPHEN J. HUFFMAN, Warden,**
*Respondent.*

**CASE NO. C-1-98-777**
**Judge Weber**
**Magistrate Judge Sherman**

FILED
KENNETH J. MURPHY
CLERK

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U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

## MOTION TO SUPPLEMENTAL MOTIONS TO EXPAND THE RECORD

Comes Now, James F. Love, hereinafter petitioner, acting in pro se, and respectfully moves to supplement petitioner's motion to expand the record. (Doc. 5, 14) The denial of those motions are presently pending on appeal to the District Court. Documents 16; 20; 21; and Motion to Submit Original Photographs filed 7/27/99 are herein incorporated by reference and the legal basis for the granting of this instant motion is fully contained within those pleadings.

Attached is the affidavit of Angela G. Erwin-Peal, P.O. Box 958, 2754 5th Street, Hurricane, W.Va. 25526, Phone number 304-562-0991. (See Exhibit P-102, attached).

Angela Erwin-Peal attests that in December 1988 she contacted the petitioner in Zihuatanejo, Mexico. Angela Erwin-Peal further attests that she had moved since the petitioner's trial in 1996 and that this is the first she has been in contact with the petitioner.

The attached affidavit is submitted to show that the petitioner is actually innocent of 4 of the 5 allegations of rape charged by Sarah Adams in the 1996 indictment and to establish by "clear and convincing evidence" that a manifest miscarriage of justice has occurred in this case. The attached affidavit is submitted to show that there was a complete breakdown in the criminal process in the case at bar.

## CONCLUSION

For all the foregoing reasons the petitioner respectfully moves to expand the record and supplement the previously filed affidavits and evidence with further proof of actual innocence.

Respectfully submitted,
/s/ James F. Love
James F. Love, #329-475
P.O. Box 45699-L3-30
Lucasville, Ohio 45699-0001
**In Pro Se**

## CERTIFICATE OF SERVICE

I, James F. Love, do hereby state under penalty of perjury that a true copy of this motion was sent to M. Scott Criss, 140 East Town Street, Columbus, Ohio 45215, by regular U.S. Mail, postage prepaid, this 16th day of August, 1999.

/s/ James F. Love
James F. Love

## AFFIDAVIT OF VERITY

I, James F. Love, do hereby state under penalty of perjury that the facts, averments and statements set forth in this motion are true and correct pursuant to 28 U.S.C. 1746, that all copies of documents attached are true copies of original documents and that I am competent to testify to the same. Executed this 16th day of August, 1999.

/s/ James F. Love
James F. Love

# AFFIDAVIT

I, Angela C. Erwin-Peal, do hereby state under penalty of perjury and pursuant to 28 U.S.C. 1764 that the following is true and correct and that I am competent to testify to the same:

1. That I personally know James F. Love who is the petitioner in Case Number C-1-98-777 presently pending before this court and have known him since I was nine years old;
2. That Mr. Love and I have been pen pals since 1984;
3. That in December of 1988 I was unable to locate Mr. Love and did hire a private investigator located in Cosa Mesa, California to locate Mr. Love because I had reason to believe that he was in Mexico;
4. That the investigator did located Mr. Love in Zihuatanejo, Mexico;
5. That in December 1988 I did write to Mr. Love, general delivery in Zihuatanejo, Mexico and that Mr. Love did write back;
6. That I was informed by my stepmother in late June 1999 that Mr. Love's mother, Clarita Brock, had called my father's home looking for me;

7. That I called Mr. Love's mother, Clarita Brock, at 513.574.4734 and had and extensive conversation with her in late June 1999;

8. During that conversation I told Ms. Brock that I believed that I still had the letters written to me by Mr. Love from Mexico and that I would search through boxes of my belongings to find the letters;

9. That I did look for the letters and could not find them;

10. That I also requested telephone records from the local telephone company but their records only go back 10 years;

11. That I requested telephone records because Mr. Love had telephoned me collect from Mexico in December 1988 also;

12. That I have personal knowledge of the above facts, statements and averments and can testify to the same;

13. That I have moved since Mr. Love's trial in 1996 and based on information and belief understand that his mother found some old letters from me and by calling several people with the same last name in

Hurricane, West Virginia, did finally make contact with my father and stepmother;

14. That I have not been in contact with Mr. Love since his trial in 1996.

FURTHER AFFIANT SAITH NAUGHT:

Executed this 11th day of July, 1999.

Angela C. Erwin-Peal
P.O. Box 958
Hurricane, West Virginia 25526
/s/ Angela C. Erwin-Peal L.S.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**JAMES F. LOVE,**
*Petitioner,*

**vs.**

**STEPHEN J. HUFFMAN, Warden,**
*Respondent.*

**CASE NO. C-1-98-777**
**Judge Weber**
**Magistrate Judge Sherman**

FILED
KENNETH J. MURPHY
CLERK

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U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

## MOTION TO SUPPLEMENTAL MOTIONS TO EXPAND THE RECORD

Comes Now James F. Love, hereinafter petitioner, acting in pro se, and respectfully moves to supplement the Motion to Expand the Record filed on 4/23/99 with the attached letter, envelopes and affidavit. The reasons for the granting of this instant motion are fully set forth in the pro se Clarification of Motions to Expand the Record, filed May 11th, 1999, and herein incorporated by reference.

Exhibit P-92 attached hereto is the envelope that Exhibit P-93 was received in by the petitioner in May of 1999 from Yvonne Zeltner-Muller of Switzerland. Exhibit P-93 is a letter from Yvonne Zeltner-Muller informing the petitioner that she had found her address book which contained the address of the Canadian couple referred to in her affidavit (filed in this court on 4/23/99), who introduced Yvonne Zeltner-Muller to the petitioner in Mexico in January 1989. The letter gives the name and address of those persons as, Rex and Carienne Jordan of 356 East 18th Street, Vancouver, British Columbia, Canada, V7L2X9.

In May 1999 the petitioner contacted Carienne Thompson-Jordan and told her that Yvonne Zeltner-Muller had named her in the affidavit filed 4/23/99 and supplied an affidavit for Carienne Thompson-Jordan to sign and return to the petitioner, the petitioner's mother (Clarita M. Brock), and petitioner's counsel.

During the first week of June 1999 both the petitioner and the petitioner's mother received a copy of the affidavit from Carienne Thompson-Jordan signed on May 29, 1999. Exhibit P-94 is the envelope that the petitioner's mother received from Carienne Thompson-Jordan. Exhibit P-95 is the affidavit that Carienne Thompson-Jordan executed on May 29th, 1999 which states that she is the person who introduced the petitioner and Yvonne Zeltner-Muller in Mexico in 1989; that she met the petitioner in Mexico in 1989; and that she has personal knowledge that the petitioner did not leave Zihuatanejo, Mexico until May of 1989.

This evidence is submitted to show that the collect call from Dallas International Airport reflected in the petitioner's mother's telephone records entered into evidence at the trial, made on May 17, 1989, was from the petitioner returning from Mexico. This "buttresses" the petitioner's evidence of actual innocence by giving greater evidence that the collect telephone call to the petitioner's mother's home on December 24th, 1988 from Mexico was also from the petitioner, as were all the collect telephone calls from Mexico and Belize to her home in 1988 and 1989.

This affidavit connects the petitioner, Yvonne Zeltner-Muller, and Carienne Thompson Jordan inextricably and places all three in Mexico when considered in conjunction with the letter from Yvonne Zeltner-Muller (Ex. P-93), and her affidavit, documents and photographs, providing by clear and convincing evidence, evidence of actual innocence and establishing that a manifest miscarriage of justice has occurred in this case in defense of the procedural defense raised by respondent in the Return of Writ.

Counsel has been on vacation for the past two weeks, did not inform the petitioner that he was going on vacation, has not responded to numerous letters, has not returned numerous telephone calls made by the petitioner's mother and has not, as instructed by the petitioner, filed the original photographs attached to Yvonne Zeltner's affidavit.

The petitioner forwarded to counsel by U.S. Certified Mail the copies of Exhibit P-94 and P-95 that petitioner received and does not have those in the petitioner's possession.

Due to the lack of communications by counsel, petitioner is acting in self-defense in filing this Motion to Supplement the Motion to Expand the Record and in ensuring that the petitioner receives a full and fair adjudication of the issues raised in the Petition for Writ of Habeas Corpus.

The petitioner is a paralegal with a Certificate of Graduation from and accredited School of Law. The petitioner has researched, drafted and edited every brief and filing in this case from the pretrial motions to this present Motion and as such asks the court to recognize the petitioner as co-counsel in this action and allow the filing of this instant motion and for the purposes of future litigation or evidentiary hearings.

In the Notice to the Court filed June 16, 1999, this petitioner requested the Clerk of the Court to forward a copy of the Journal Entry Docket, no docket was forthcoming and the petitioner again requests that a copy be forwarded to him.

The petitioner apologizes to the court for the continued pro se filings, but petitioner after 13 years of fighting false allegations of rape will not be denied his day in court, and even if petitioner should lose this action, wants the record complete when one day his daughter comes to find out the truth about her father.

## CONCLUSION

For all the foregoing reasons petitioner respectfully files Motion to Supplement the Motion to Expand filed on 4/23/99.

Respectfully submitted,
/s/ James F. Love
James F. Love, #329-475
P.O. Box 45699-L3-30
Lucasville, Ohio 45699-0001
In Pro Se

## CERTIFICATE OF SERVICE

I, James F. Love, do hereby state under penalty of perjury that a true copy of the foregoing motion was sent to M. Scott Criss, Assistant Attorney General, 140 East Town Street, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 24th day of June, 1999.

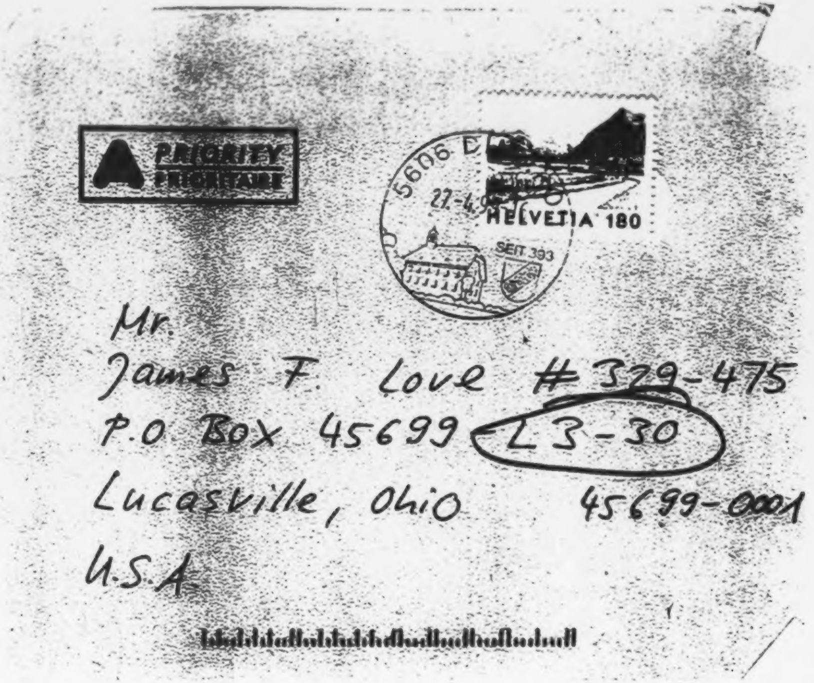
/s/ James F. Love
James F. Love

## AFFIDAVIT OF VERITY

I, James F. Love, do hereby declare under penalty of perjury and pursuant to 28 U.S.C. §1746 that the facts, averments and statements set forth in this document are true and correct, that all documents attached are true copies of original documents, and that I am competent to testify to the same.

Executed the 24th day of June, 1999.

/s/ James F. Love
James F. Love



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SEIT 393

HELVETIA 180

Mr.
James F. Love #329-475
P.O Box 45699 L3-30
Lucasville, Ohio 45699-0001
U.S.A.

5/14/99

K-7

Exhibit P-92

CH-5606 Dintikon, April 26

Yvonne Zeltner-Muller
Bergstrasse 17
5606 Dintikon
Tel. 056 6242944
Fax 056 6242242
e-mail: zeltner@pop.agri.ch

Mr. Kevin Spiering
Attorney-at-Law
2602 Central Trust Tower
One West Fourth Street
Cincinnati, Ohio 45202

Dear Mr Spiering,

**Re: my letter of March 26 regarding James Love**

I have refound my address book. As follows the address of the Canadian couple I wrote of in my letter.

Rex + Cairinne JORDAN
356 E 18th St.
North Vancouver
B.C. Canada
V7L2X9

Res. 604-987-1541
Bus. 604-988-1481

K-8

I hope this will be of help to you!

Sincerely,

Yvonne Zeltner-Muller

James

Kind regards,

Yvonne

POST
1989
POST

POSTAL CODE

CANADA
55

Clarita M. Brock
6076 Shed Road
Cincinnati, Ohio
45247

Affidavit

45247+3748

K-10

Exhibit P-94

May 29, 1999

Carienne Thompson-Jordan
356 East 18th Street
North Vancouve, British Columbia
Canada; V7L2X9

Exhibit P.95

## AFFIDAVIT

I, Carienne Thompson-Jordan, do hereby declare under penalty of perjury and pursuant to Title 28 United States Code Section 1746 that the following is true and correct and that I am competent to testify to the same:

1.) That I am a Canadian citizen;

2.) That my ex-husband, Rex Jordan, and I regularly vacationed in the winter in Zihuatanejo, Mexico;

3.) That in 1989 I met a woman named Yvonne Muller from Switzerland in Zihuatanejo, Mexico;

4.) That in 1989 I met a man named James Love in Zihuatanejo, Mexico;

5.) That I introduced James Love to Yvonne Muller in 1989 in Zihuatanejo, Mexico;

6.) That I remember that James Love left Zihuatanejo, Mexico sometime in May of 1989 because I believed that he had rode back to the United States with some other people that I knew who left about that same time;

7.) That I have been ill for the past two years and although Mr. Love contacted me by mail sometime last year, I have been reluctant to become involved due to my illness;

8.) That I was reluctant to become involved and execute an affidavit because I was not sure of the exact dates and times that I had arrived and left Mexico that year;

9.) That I do remember and have personal knowledge of the above facts.

FURTHER AFFIANT SAITH NAUGHT.

EXECUTED THIS 29TH DAY OF MAY, 1999.

/s/ Carienne Thompson-Jordan
Carienne Thompson-Jordan

## IN THE UNITED STATES DISTRICT COURT
## FOR THE SOUTHERN DISTRICT OF OHIO
## WESTERN DIVISION

**JAMES F. LOVE,**
*Petitioner,*

vs.

**STEPHEN J. HUFFMAN, Warden,**
*Respondent.*

**CASE NO. C-1-98-777**
**Judge Weber**
**(Magistrate Sherman)**

FILED
CLERK
99 APR 03 PM 1:50
JAMES FRANK
DISTRICT COURT
DIST OHIO
DIV CINCINNATI

## PETITIONER'S REQUEST FOR RULING ON MOTION TO EXPAND RECORD

Comes now Petitioner, Mr. James Love, by and through counsel, and hereby requests the court to rule upon Petitioner's Motion to Expand Record filed on November 23, 1998. In that Motion Petitioner requested the Court to order the Hamilton County Clerk of Courts to release the exhibits used at trial for use by this Court Petitioner's counsel is prepared to make all necessary arrangements for the release of those exhibits.

Petitioner also seeks to expand the record with an sworn Affidavit signed by Yvonne Zeltner-Muller, which Petitioner's counsel received on April 22, 1999 That

Affidavit and supporting documentation supports Petitioner's claim that he was out of the country in 1988 and 1989 and thus, could not possibly have committed the allegations testified to during that time frame for the 1996 case, as claimed in the Petition for Writ of Habeas Corpus, paragraph II Attached to this Motion is the Affidavit and supporting documentation.

WHEREFORE, counsel for Petitioner respectfully requests this Motion to be granted.

Respectfully submitted,
/s/ Kevin J. Spiering
KEVIN J. SPIERING (0063973)
Counsel for Petitioner
2602 Central Trust Tower
One W. Fourth Street
Cincinnati, OH 45202
(513) 381-1500

# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the office of M. Scott Criss, Assistant Attorney General, 140 E. Town Street, 14th Floor, Columbus, OH 43215-6001, this 23rd day of April, 1999.

/s/ Kevin J. Spiering
KEVIN J. SPIERING (0063973)

CH-5606 Dintikon, 26. Marz 1999
Yvonne Zeltner-Muller
Bergstrasse 17
5606 Dintikon
Tel. 056 6242944
Fax 056 6242242
e-mail: zeltner@pop.agri.ch

Mr. Kevin Spiering
Attorney-at-Law
2602 Central Trust Tower
One West Fourth Street
Cincinnati, Ohio 45202

Dear Mr Spiering,

I refer to the letter of James F. Love at Lucasville/Ohio of 12/21/98 informing me that he must prove his time in Zihuatanejo (Mexico) and asking me for an affidavit stating when I was in Mexico and describing what I remember of him. I herewith attest the following:

I was from January 2 to February 28, 1989 in Mexico living in a hotel in Zihuatanejo called Posada Citali. During that time I took Spanish lessons at the Instituto de Idiomas Britania. Although many things happened during the last 10 years (I married and am now the mother of 3 children), I remember my time in Mexico very well. Especially, as I had a wonderful stay there. Zihuatanejo is such a picturesque little town with a marvelous beach and a sky-blue sea with millions of colorful fishes. I met Jim (James Love) at the Zihuatanejo beach. I used to go to a little beach called La Ropa where I generally met the same people. One of them was Jim. He was introduced to me by a Canadian couple that used to spend the Canadian winterseason in Zihuatanejo. Jim worked in a little restaurant at the end of La Ropa beach. We always used to chat a little. He was very interested in Switzerland and its culture. He told me that he lived in an apartment behind the restaurant. He warned me not to go to near to the hedge at the end of the beach, as there are scorpions and poisonous spiders. I never will forget when he surprise I me with a selfmixed Pina Colada (a drink with Coca nut milk, Rum and I think pineapple), served in a huge coconut. Jim once invited me for a date what I declined. He didn't have problems with my negative reply and we still could stay "beach" friends.

The Canadian couple lived about 5 or 6 months in Mexico and they could attest Jim's stay in Zihuatanejo for a longer period of time. Unfortunately I do not have their address anymore.

I herewith enclose the following documents:

- 1 picture of the Canadian couple that knew him and me
- 1 picture of Zihuatanejo harbour
- 1 photo of the hotel I lived
- 1 picture of James F. Love and me (it's not a very charming picture, especially as I am today a persuaded non-smoker - but maybe the photo is of help). On the back of that picture you will find the development date of April 89.
- 1 copy of the certificate I got from my Spanish school and the receipt of the fees I paid. I enclose these documents, in order to attest my own stay in Zihuatanejo.

I swear that the above statement is true and attest it with my signature.

Yvonne Zeltner-Muller
/s/ Y. Zeltner

Cc: - American Embassy, Jubilaumsstr. 93, CH-3005 Bern
- James F. Love, #329-475, P.O.Box 45699-L3-30, Lucasville, Ohio 45699-0001

**APOSTILLE**
(Convention de la Haye du 5 octobre 1961)

1. Land: Schweizerische Eidgenossenschaft / Kanton Aargau
country Swiss Confederation / Canton of Argovia

Diese öffentliche Urkunde
This public document

2. ist unterschrieben von
has been signed by ...... Peter Meyer

3. in seiner Eigenschaft als
acting in the capacity of ........ AARGAUISCHER NOTAR

4. sie ist versehen mit dem Stempel/Siegel des (der)
bears the stamp/seal of the

Peter Meyer ........ AARGAUISCHER NOTAR

Bestätigt/Certified

5. in
at 5001 Aarau

6. am
the ........ 06. April 1999

7. durch das PASS- UND PATENTAMT DES KANTONS AARGAU
by the PASSPORT- AND PATENT OFFICE OF THE CANTON OF ARGOVIA

8. unter Nr
under the No. ........ 872

9. Stempel/Siegel
stamp/seal

10. Unterschrift/Signature:
PASS- UND PATENTAMT
DES KANTONS AARGAU
PASSPORT- AND PATENT OFFICE
OF THE CANTON OF ARGOVIA
Der Chef / haed of the office:
In Vertretung:

Taxe/tax SFr. 40.-

**INSTITUTO DE IDIOMAS "BRITANIA"**
JUAN N. ALVAREZ 17 ZIHUATANEJO, GRO.

# RECIBO

BUENO POR: $600.00 U.S. DLS.

RECIBI DE LA SRITA. YVONNE MUELLER, LA CANTIDAD DE $600.00 U.S. DLS. (SEISCIENTOS DOLARES AMERICANOS), POR CONCEPTO DE PAGO A UN CURSO BIMESTRAL DE ESPANOL, CON DURACTION DE ----- OCHENTA HORAS-CLASE.

ZIHUATANEJO, GRO. A 28 DE FEBRERO DE 1989.

RECIBI:

PROFRA. EXPERANZA MORA L.

DIRECTORA

**INSTITUTO DE IDIOMAS "BRITANIA"**
JUAN N. ALVAREZ 17 ZIHUATANEJO, GRO.

A QUIEN CORRESPONDA:

LA DIRECCION Y PERSONAL AUTORIZADO DE ESTE INSTITUTO, HACEN CONSTAR QUE LA ESTUDIANTE:

----------- YNONNE MUELLER ---------

ASISTIO REGULARMENTE AL SURSO BIMESTRAL DE ESPANOL, EN EL NIVEL DE AVANZADOS, OBTENIENDO LOS SIGUIENTES RESULTADOS:

GRAMATICA ...... MB
DUCCUIB ........ B
CINOISUCUIB .... MB

LA EVALUACION FUE HECHA EN BASE A LO SIGUIENTE ESCALA:

MB (MUY BIEN)  B (BIEN)  S (SUFICIENTE)
NS (NO SUFICIENTE)

PARA LOS USOS LEGALES QUE A LA INTERESADA CONVENGAN, SE EX TIENDE LA PRESENTE EN LA CUIDAD Y PUERTO DE ZIHUATANEJO, ---- GUERRERO ALOS VEINTIOCHO DIAS DEL MES DE FEBRERO DE MIL NO VECIENTOS OCHENTA Y NUEVE.

PROFRA. EXPERANZA MORA L.
DIRECTORA

FILED
NOV 23 1998
KENNETH J. MURPHY, Clerk
CINCINNATI, OHIO

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

**JAMES F. LOVE,** : **Case No. C-1-98-777**
***Petitioner,*** : **Judge Spiegel**
: **Magistrate Sherman**
**vs.** :
:
**STEVEN J. HUFFMAN,** : **PETITIONER'S**
***Respondent.*** : **MOTION TO**
: **EXPAND RECORD**

Comes now Petitioner, by and through counsel, and hereby moves the Court for an Order to expand the record. Specifically, Petitioner seeks to include all exhibits and physical evidence introduced and amitted at the state trials for which Petitioner was convucted and seeks relief in this cause. Petitioner respectfully requests the Court to order the Clerk of Courts, Court of Common Pleas, Hamilton County, Ohio, to release the exhibits for use by the Court.

Should the Court so decided, Petitioner is prepared to hold a hearing on this matter.

Respectfully submitted,

/s/Kevin J. Spiering
Kevin J. Spiering (0063973)
Attorney for Petitioner
2602 Central Trust Tower
One West Fourth Street
Cincinnati, OH 45202
(513) 381-1500

## MEMORANDUM IN SUPPORT

On October 14, 1998, Petitioner, acting pro se, filed the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. Included in that filing are 91 exhibits consisting of state court documents, all of which were duly served upon Respondent. Needless to say, this is a very complex and voluminous Petition.

Pursuant to Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition. The expanded record may include exhibits and evidence introduced and admitted at the state court trial. The purpose of Rule 7 is to provide the Court all necessary and relevant information and assist it in its determination on the merits of the Petition.

Counsel has examined the Petition consisting of 133 pages and the six grounds raised therein. Counsel also has reviewed the case law cited by Petitioner. Counsel submits that the grounds raised contain very detailed and sophisticated legal arguments, and they should be supported by all of he physical evidence forming the bases of the grounds raised and the errors complained of. Counsel further submits that expanding the record to include all physical items of evidence used at the state trials will clarify the errors complained of and thus assist the Court in making a fair and just determination of the Petitioner.

Attached as Exhibit "1" are copies of the exhibit file index cards of State v. Love, Case Nos. B863968 and B961201. The index cards depict all of the items of evidence used at the state trials, including Joint Exhibit A, which is the chart used by the prosecution to show all of the similarities between the two cases and "other acts" evdience admitted at trial. The index cards and the exhibits are in the custody of Exhibit Clerk Jerry Costa of the Clerk of Courts, Hamilton County Court of Common Pleas Division, Room 564, Hamilton County Courthouse, 1000 Main Street, Cincinnati, Ohio 45202.

Mr. Costa's phone number is (513) 632-7350. Counsel has met with Mr. Costa and has personally verified the existence of the exhibits.

It should also be pointed out to the Court that counsel in this Petition was part of the defense team for the 1996 trial as well as appellate counsel on appeal. Counsel submits that he is familiar with the transcripts and all of the state court documents cited in the Petition. In sum, counsel is familiar with the facts, procedural posture, and issues raised in this case.

Counsel further submits that not only are the errors complained of and the supporting legal arguments detailed and sophisticated, they are also very abstract, unless supported and clarified with the items of evidence used at the state trials. Expansion of the record to include the items of evidence kept in the custody of the Exhibit Clerk will assist Petitioner in presenting the legal arguments raised and the supporting factual bases for the arguments.

WHEREFORE, Petitioner respectfully reqeusts this Motion to be granted and the Court order the Hamilton County Clerk of Courts to release all the items of evidence depicted in Exhibit "1" for this Court's consideration of the Petition. Counsel for Petitioner will assist the Court and the Attorney General in any way possible in order to secure the release of the items of evidence and ensure proper filing with the court.

## PROOF OF SERVICE

I hereby certify that a copy of the foregoing was delivered via ordinary U.S. Mail to Assistant Attorney General Scott Criss, Captial Crimes Section, 140 E. Town Street, Columbus, Ohio 43215 this 23rd day of November, 1998.

/s/Kevin J. Spiering
Attorney for Petitioner

T.p. 657:

Q: Okay. Well, if he started dating your mom in the fall of 1988, did this happen in 1988, the first time?

A. Yes.

Q: Did it happen before Christmas or after Christmas?

A: Before Christmas.

Q: And did Mr. Love say anything to you after he had done this about whether or not you should tell anybody?

A: He told me not to tell anybody.

Q: Now, did he ever do this to you again?

A: Yes.

Q: Did he did it to you in 1989?

A: Yes.

Q: 89?

A: Yes.

A: Do you remember when the next time it was that he did it to you?

A: It happened a lot of times. I don't remember the exact times.

Q: Did it happen more than once a month?

A: Yes.

T.p. 658:

Q: Now, was that in the springtime in 1989, or summertime, or the fall?

A: I think it was the springtime.

T.p. 668:

Q: And did it happen in 1990, too? Excuse me, I meant to say 1990 also? Did it happen then, or do you know?

A: I can't remember exactly when the last time was.

T.p. 710:

Q: And do you know whether that was after Christmas of 1988, or before Christmas of 1988, the first time that he did this to you?

A: I think it was after that.

T.p. 711:

Q: Are you saying that it occurred in 1988, after Christmas?

A: No. I said it occurred after Christmas in 1988.

## Rule 10. The Record on Appeal

### (e) Correction or Modification of the Record.

If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. dec. 1, 1993; Apr. 27, 1995, eff. dec. 1, 1995.)

## Rule 7. Expansion of Record

**(a) Direction for expansion.** If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

**(b) Materials to be added**. The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

**(c) Submission to opposing party**. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he shall be afforded an opportunity to admit or deny their correctness.

**(d) Authentication**. The court may require the authentication of any material under subdivision (b) or (c).